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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; JEFFREY B. PINE, in his capacity as Attorney General of the State of Rhode Island; TOWN OF CHARLESTOWN; ROBERT J. SCHIEDLER, CHARLES W. BECK, CHARLENE Q. DUNN, FORRESTER C. SAFFORD, and J. MICHAEL DOWNEY, in their capacity as Members of the Charlestown Town Council,

Petitioners,

vs.

NARRAGANSETT INDIAN TRIBE, GEORGE V. HOPKINS, in his capacity as Chief Sachem, and ANTHONY DEAN STANTON, in his capacity as First Councilman,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the First Circuit erred when it:

A. Held that the Indian Gaming Regulatory Act, which authorizes gambling on certain Indian lands, impliedly repealed portions of the pre-existing Rhode Island Indian Claims Settlement Act, which implemented a negotiated tribal-state compact between the State of Rhode Island and the Narragansett Indian Tribe; and

B. Refused to consider explicit statements in the the Indian Gaming Regulatory Act's legislative history – to the effect that Congress did not intend the Act to alter the Rhode Island Indian Claims Settlement Act.

PARTIES TO THE PROCEEDING

The parties to the proceedings below are as follows:

Appellants in the Court of Appeals: STATE OF RHODE ISLAND; JEFFREY B. PINE, in his capacity as Attorney General of the State of Rhode Island; BRUCE SUNDLUN, in his capacity as Governor of the State of Rhode Island; TOWN OF CHARLESTOWN; DANIEL J. SHANLEY, JR., CAROL M. MILLER, RICHARD J. HALCHAK, J. MICHAEL DOWNEY, and EVELYN SMITH, in their capacity as Members of the Charlestown Town Council.

Appellees in the Court of Appeals: NARRAGANSETT INDIAN TRIBE, GEORGE V. HOPKINS, in his capacity as Chief Sachem; and ANTHONY DEAN STANTON, in his capacity as First Councilman.

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Now come the State of Rhode Island, Jeffrey B. Pine in his capacity as Attorney General of the State of Rhode Island, the Town of Charlestown, Daniel J. Shanley, Jr., Carol M. Miller, Richard J. Halchak, J. Michael Downey, and Evelyn Smith, in their capacity as Members of the Charlestown Town Council, by their attorneys, and pray that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit to review said court's decision on an "important question of federal law which has not been, but should be, settled by this Court," U.S. S. Ct. R. 10.1(c), and which, in other regards, "conflicts with applicable decisions of this Court." *Id.*

OPINIONS OF COURT OF APPEALS AND DISTRICT COURT

The opinion of the United States Court of Appeals for the First Circuit, reported at 19 F.3d 685 (1st Cir. 1994), is reproduced in Section A of the appendix hereto. The opinion of the District Court for the District of Rhode Island, reported at 816 F. Supp. 796 (D.R.I. 1993), is reproduced in Section B of the appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 23, 1994. A

timely petition for rehearing and suggestion for re-hearing *en banc* were denied on June 2, 1994.[1] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and by Rules of the Supreme Court of the United States R. 10 and 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the following constitutional and statutory provisions involved in this case are set out in Sections E and J of the Appendix, in accordance with Rule 14 of the Rules of this Court. The Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.*, and the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* are reproduced in Appendix E and J.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Petitioners commenced the within action as a complaint for declaratory judgment, seeking a declaration by the United States District Court (D.R.I.) that certain portions of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*, [hereinafter referred to as IGRA], did not apply in Rhode Island because of the terms of the Rhode Island Indian Claims Settlement Act, 25 U.S.C.

[1] On June 10, 1994, the Court of Appeals granted the petitioners' timely motion for stay of the mandate until July 11, 1994.

§ 1701 *et seq.* [hereinafter referred to as RICSA]. The Petitioners contended that RICSA, enacted in 1978, specifically conferred upon the State of Rhode Island civil and criminal jurisdiction over lands conveyed to the Narragansett Indian Tribe in Charlestown, R.I. The Petitioners therefore claimed that the 1988 enactment of IGRA, which provided a mechanism for establishing certain types of gambling on "Indian Lands," did not apply to the lands that were covered by RICSA. In District Court the parties entered into an agreed statement of facts and filed cross-motions for summary judgment. The District Court, Pettine, Sr. Judge, rejected the Petitioners' claims and declared that IGRA operated to "pre-empt the field," invalidating the prior jurisdictional grant contained in RICSA. App. B at 63. The Petitioners appealed to the United States Court of Appeals for the First Circuit. After briefing and argument, a panel of the Court of Appeals affirmed, holding that IGRA partially repealed by implication certain portions of RICSA. In reaching this result, the Court of Appeals first rejected the District Court's pre-emption theory, finding, moreover, that RICSA contained an extremely broad grant of criminal, civil, and regulatory jurisdiction to the State of Rhode Island. The Court of Appeals went on to conclude, however, with one dissenting vote, that RICSA's jurisdictional grant had been partially repealed by implication with regard to gambling, by the subsequent enactment of IGRA. A timely petition for rehearing and suggestion of rehearing en banc were denied on June 2, 1994. The instant petition ensued.

II. FACTUAL BACKGROUND

A. Tribal Consent to Rhode Island Law and Jurisdiction In Settlement of Litigation. In 1975, the Narragansett Indian Tribe (the "Tribe") filed two actions in the United States District Court for the District of Rhode Island against the Director of the Rhode Island Department of Environmental Management [hereinafter referred to as the State] and a number of private landowners in Charlestown, R.I. In these actions, the Tribe claimed ownership, by virtue of its aboriginal title, of approximately 3200 acres of public and private land in Charlestown. *See Narragansett Tribe of Indians v. So. R.I. Land Devel. Corp., et al.*, 418 F.Supp. 798 (D.R.I. 1976); *Narragansett Tribe of Indians v. Murphy*, 426 F.Supp. 132 (D.R.I. 1976). This lawsuit, in effect, formed a cloud on the title to the real estate of a substantial portion of southern Rhode Island. *Id.*

In 1978, the Tribe, the private party litigants, various state officials, and the Charlestown Town Council, settled the lawsuits and entered into a "Joint Memorandum of Understanding" or a "Settlement Agreement" [hereinafter referred to as the Settlement Agreement] to resolve the federal court cases. This Settlement Agreement was predicated upon, and made subject to, approval by Congress and enactment of legislation by the Rhode Island General Assembly. *See* App. L at 126. *See also Town of Charlestown, R.I. v. U.S.*, 696 F.Supp. 800, 802 (D.R.I. 1988), *aff'd* 873 F.2d 1433 (1st Cir. 1989). Specifically, the terms of the Settlement Agreement provided:

A. For establishment of "Settlement Lands" by the conveyance of approximately 900 acres of State-owned

land without compensation and approximately 900 acres of privately-owned land to be purchased with federal funds at fair market value;

B. That all State and local laws would continue to be in full force and effect on the Settlement Lands, with the exception of certain hunting and fishing regulations; and

C. That the Tribe would cause their lawsuits to be dismissed with prejudice and would consent to the extinguishment by the federal government of all Narragansett Indian tribal claims for possession of land within Rhode Island in order to clear non-Indian title to non-Settlement Lands claimed by the Tribe. A copy of the Settlement Agreement is set forth in Appendix L.

B. Congress Acts to Implement the Settlement Agreement. In accordance with the Settlement Agreement, Congress in 1978 enacted the Rhode Island Indian Claims Settlement Act, which largely tracked the language of the Settlement Agreement. App. A at 4. *See* Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701 *et seq.* [hereinafter referred to as RICSA]. The Rhode Island General Assembly likewise adopted legislation in fulfillment of its obligation under the agreement. Narragansett Indian Land Management Corporation Act, R.I. Gen. Laws §§ 37-18-1 *et seq.* This state statute, in conformity with the Settlement Agreement and RICSA, subjected all activities of the Tribe "to all the criminal and civil laws of the state and the town." *Id.*, § 37-18-11.

In enacting RICSA, Congress declared that, *inter alia*,

> . . . the parties to the lawsuits and others interested in the settlement of Indian land claims

> within the State of Rhode Island have executed a Settlement Agreement *which requires implementing legislation by the Congress of the United States and the legislation of the State of Rhode Island.*

25 U.S.C. § 1701(d) (emphasis added). The House Report accompanying RICSA noted the historic importance of such legislative implementation of the settlement of a Federal Court Indian Land Claims lawsuit:

> This bill represents the first legislation submitted to the Congress which would resolve the land claims of an Indian tribe arising under the Trade and Intercourse Act of 1790, as amended and supplemented, on the basis of *an out-of-court settlement negotiated between the Tribe and the affected parties.* The committee is convinced that this legislation will serve *as a landmark for the resolution of other land claims* by eastern tribes under the Trade and Intercourse Act.

App. K at 124 (emphasis added). This statement proved prophetic, for in the years following RICSA, Congress adopted several similar acts that consummated settlements between other states and tribes. *See, e.g., Maine Settlement Act* (Passamaquoddy and Penobscot) 25 U.S.C. §§ 1725 *et seq*; *Florida Settlement Act* (Miccosukee), 25 U.S.C. §§ 1741 *et seq*; *Connecticut Settlement Act* (Meshantucket Pequot), 25 U.S.C. §§ 1751 *et seq.*; *New York Settlement Act* (Seneca) 25 U.S.C. §§ 1774 *et seq.*

In settling the suit, the State and private litigants gave up their right to contest the Tribe's aboriginal claims. Cf. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (tribe bears burden of proving certain elements of tribal status in

order to have viable claim of aboriginal sovereignty). The Tribe, for its part, conceded that the Settlement Lands would be subject to the civil and criminal jurisdiction of the State of Rhode Island. App. L at 129, para. 13. This particular provision of the Settlement Agreement appears in RICSA as follows:

> Except as otherwise provided in this subchapter, [related to hunting and fishing and taxing issues], the settlement lands *shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.*

25 U.S.C. § 1708 (emphasis added).

Passage of RICSA was a signal event, representing a key element in a negotiated agreement among the parties to the litigation, and involving concerted activity by the Executive and Legislative Branches of the State of Rhode Island, as well as the Executive, Legislative, and Judicial Branches of the federal government.

C. The Transfer of The Narragansett Indian Tribe's Settlement Lands to the United States In Trust. The Settlement Agreement contemplated a chain of land conveyances which culminated in September 1988, when the federal government took title to the Settlement Lands as grantee in trust. App. A at 4, 5. This deed of trust specifically incorporated by reference the applicability of State criminal and civil law and jurisdiction conferred by the Rhode Island Settlement Act. *See* Deeds dated Sept. 12, 1988 (emphasis added) [reproduced at appendix H]. The deeds likewise acknowledge that the conveyances were subject to R.I. Gen. L. § 37-18-11, which subjected the Tribe and its activities to all civil and criminal laws and

jurisdiction of Rhode Island. *Id.* Thus, as of September 1988, the Settlement Agreement's clear grant of criminal and civil laws and jurisdiction to the State of Rhode Island could not be subject to serious dispute, having been agreed upon by the parties as a term of their settlement, ratified by Congress in RICSA in 1978 and specifically acknowledged by the United States as trustee in 1988. Indeed, interpreting RICSA in 1987, the Department of Interior specifically concluded that gambling on Settlement Lands in Rhode Island was specifically and exclusively governed by Rhode Island law. *See* correspondence dated Oct. 21, 1987, from the U. S. Department of Interior (concluding that RICSA and its legislative history make clear "that any gambling activities on the settlement lands must conform to state laws . . . "). App. I.

D. The enactment of IGRA. Despite the clear and unambiguous jurisdictional lines defined in virtually every document related in any way to the Settlement Lands, the Tribe contends the arrangement was modified in October 1988, when Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq* [hereinafter referred to as IGRA]. IGRA provides a statutory framework for some Indian Tribes to conduct casino-type gambling. Such gambling is permissible on Indian lands only by an "Indian tribe *having jurisdiction* over such lands . . . " 25 U.S.C. § 2710(d)(1)(A); *id.*, § 2710(d)(3)(A). Congress recognized that any State would desire to have some involvement in the operation and regulation of casino gambling within its borders. Thus, IGRA specifically requires "[a]ny Indian tribe *having jurisdiction over the Indian lands*" where gambling is contemplated to enter

into negotiations with the State "for the purpose of entering into a Tribal-State compact[2] governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). "Indian lands" is defined in pertinent part as lands over which "an Indian tribe exercises governmental power." *Id.* § 2703(4)(B).

Because the specific provisions of IGRA permit casino-type gambling only by an "Indian tribe having jurisdiction over" Indian lands, Congress made clear that not all Indian tribes would have authority to enter into the compacting process. With regard to Rhode Island, RICSA specifically mandated that the Settlement Lands would be subject to the "civil and criminal laws and jurisdiction of the State of Rhode Island." RICSA, 25

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[2] It is unclear whether, by using the term "compact," Congress believed that an agreement between a state and a tribe is governed by the Compact Clause. U.S. Const. Art. I, § 10, cl. 8. The Compact Clause makes no reference to agreements between States and Indian Tribes, and the Petitioners are unaware of any case in which a court has held that such agreements are subject to the Clause. Nevertheless, the Clause does apply to agreements between States and foreign nations. The traditional views of tribal sovereignty might well counsel in favor of applying the clause to tribal-state agreements that deal with issues of sovereignty. The various Settlement Acts, *supra*, have all been approved by Congress in a manner similar to compacts. Congress considered, but did not enact, a "Tribal-State Compact Act," *See* Hearings on S. 2505, Sen. Sel. Comm. on Indian Affairs, 95th Cong., 2d Sess 3-11 (1978), which would have provided a structural framework for negotiated agreements dealing with a broad range of sovereignty issues. Although that act did not become law, Congress in enacting IGRA, did choose the term "compact" to describe agreements between states and tribes for the regulation of gambling on Indian lands.

U.S.C. § 1708. Thus, the Petitioners have contended throughout this litigation – supported by contemporaneous legislative history of IGRA – that IGRA had no effect upon the Settlement Lands because the Tribe did not meet IGRA's "having jurisdiction" criterion.

III. DECISION OF THE COURT OF APPEALS

The issue presented for declaratory relief in this case was whether Congress, when it provided a tribal-state compacting process for Indian tribes "having jurisdiction" over "Indian lands," IGRA, 25 U.S.C. § 2701 *et seq.*, intended to modify the previous boundaries of civil and criminal law and jurisdiction set forth in RICSA, '25 U.S.C. § 1701, *et seq*. Over a dissent by Senior Judge Frank M. Coffin, the Court of Appeals, in an opinion by Judge Bruce Selya, concluded that IGRA worked such a modification by way of implied repeal.

The court began its analysis by concluding that the Settlement Agreement and RICSA did, indeed, constitute broad grants to the State of civil and regulatory jurisdiction over the Settlement lands. App. A at 19-22. Because IGRA, if it applied in Rhode Island, would present a new limitation on the State's broad authority over the Settlement Lands, the Court found that RICSA and IGRA were "partially repugnant" to each other. The Court thus confronted the question whether Congress, in enacting IGRA, had repealed or amended portions of the jurisdictional grant contained in RICSA.

Because IGRA did not contain any provision setting forth an explicit repeal or amendment of RICSA, such a repeal could only be found by implication. Although

conceding that "implied repeals of federal statutes are disfavored," App. A at 40, the Court of Appeals reasoned that "if the two [acts] are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." App. A at 40. The Court of Appeals recognized that the legislative history of IGRA cast some cloud over the suggestion that Congress actually intended to modify Rhode Island's broad authority over the Settlement Lands. An earlier draft of IGRA had contained a specific provision to the effect that IGRA was not intended to repeal or amend RICSA. This section was removed during the drafting process, with the belief by the drafters that such a section was unnecessary. Indeed, a floor colloquy between Rhode Island's two Senators and Senator Daniel Inouye – the principal author of IGRA – provides significant insight into what Congress thought it was and was not doing:

> Mr. PELL. Mr. President, I would like to thank the managers of S.555, the Indian Gaming Regulatory Act, and particularly the chairman of the Select Committee on Indian Affairs [Mr. Inouye], for their hard work and patience in achieving a consensus on this important measure.
>
> In the interests of clarity, I have asked that language specifically citing the protections of the Rhode Island Claims Settlement Act (Public Law 95-395) be stricken from S.555. I understand that *these protections clearly will remain in effect.*

Mr. INOUYE. I thank my colleague, the senior Senator from Rhode Island [Mr. Pell], and assure him that *the protections of the Rhode Island Claims Settlement Act (P.L. 95-395), will remain in effect and that the Narragansett Indian Tribe clearly will remain subject to the civil, criminal, and regulatory laws of the State of Rhode Island.*

Mr. CHAFEE. Mr. President, I too would like to thank the chairman [Mr. Inouye] and members of the Select Committee on Indian Affairs for their cooperation and assistance. The chairman's statement makes it clear that *any high stakes gaming, including bingo, in Rhode Island will remain subject to the civil, criminal and regulatory laws of our State.*

App. G at 102-03, 134 Cong. Rec. S12650 (daily ed. Sept. 15, 1988) (emphasis added). This colloquy was completely consistent with the Senate Report that accompanied IGRA, wherein the committee explained its understanding or the impact of IGRA upon tribal-state settlement acts:

> [I]t is the intention of the Committee that nothing in the provision of this section or in this act will supercede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act (Act of September 30, 1978, 92 Stat. 813; P.L. 95-395) and the [Maine]

> Indian Claims Settlement Act (Act of October 10, 1980; 94 Stat. 1785; P.L. 96-420).

App. F at 100-01, S. Rep. No. 446, 100th Cong. 2d Sess. 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082.

The statements of legislative intent contained in both the floor debate and the principal committee report were of no avail to the Court of Appeals. Pleading "guilty to the charge of literalism", App. A at 32, n.17, Judge Selya's opinion for the majority reasoned that the text of IGRA impliedly repealed RICSA's jurisdictional grant; other legislative aids to interpretation were simply of no moment. The Court of Appeals did not so much reject the argument that Congress intended RICSA to remain intact; rather, the court reasoned that if Congress had not intended to repeal RICSA by implication, it should have stated its intentions with greater clarity. See App. A at 33, n.17 ("If legislative bodies desire to accomplish particular results, they must use their tools with greater care").

In his dissent, Senior Judge Coffin closely followed this Court's decision in *Watt v. Alaska*, 451 U.S. 259 (1981). As this Court had done in *Watt*, Judge Coffin reasoned that when two statutes are in direct tension, it is incumbent upon the court, in its search for Congressional intent, to first look to the plain meaning of the words of the statute. App. A at 48. Citing *Watt*, Judge Coffin noted that the "plain meaning" rule may not end the inquiry when "[t]he circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." App. A at 48, *citing Watt*, 451 U.S. at 265-66.

Just as this Court had done in *Watt*, Judge Coffin found strong support for legislative intent in the Congressional statements leading up to the latter statute. Judge Coffin focussed in particular on the colloquy between Senator Inouye and the Rhode Island delegation; in this circumstance, the dissent concluded that:

> It seems clear to me, at least, that the legislative history in this record reveals not merely the lack of a 'clear and manifest' Congressional intent to repeal, but an affirmative intent that the pre-existing legislation should remain intact.

App. A at 49.

The proper role of legislative history, Judge Coffin noted, is to clarify a statute's true meaning. Pointing out that the remarks of Senator Inouye, the bill's sponsor and floor manager, ought to be "afforded substantial weight", App. A at 51 (citations omitted), Judge Coffin likewise relied upon the Senate Committee Report's statement of intent. "[Assigning] proper weight to the legislative history," Judge Coffin reasoned, "we would have to conclude that the Gaming Act had effected no implied repeal of the Settlement Act." App. A at 52.

ARGUMENT

The Court of Appeals' holding that portions of the Rhode Island Land Claims Settlement Act [RICSA] was repealed by implication by the Indian Gaming Regulatory Act [IGRA] was directly contrary to the principle that repeals by implication are disfavored and conflicts with explicit expressions of Congressional intent contained in the legislative history of IGRA.

The Court of Appeals was confronted with a novel question regarding the effect of IGRA upon a pre-existing

Indian Land Settlement Act. Given the proliferation of such settlement acts, the issue is one "which has not been, but should be, settled by this Court . . . " U.S. S. Ct. R. 10.1(c). Moreover, the Court of Appeals, in finding a repeal by implication, engaged in a method of statutory construction that "conflicts with applicable decisions of this Court." *Id.*

The Petitioners submit that the Court of Appeals' decision is flawed in that it misinterprets the language and legislative purpose of both RICSA and IGRA. To reach this erroneous conclusion, the Court of Appeals found that RICSA and IGRA cannot be reconciled and that, accordingly, Congress must have intended IGRA to effectuate a partial repeal of RICSA. This reasoning misapplies substantial and important principles of statutory construction, because the court failed to comply with this Court's repeated holdings regarding repeals by implication. In addition, the Court of Appeals failed to give proper weight to clear statements of Congressional purpose contained in portions of IGRA's legislative history. The Court of Appeals' decision, therefore, erroneously concludes that IGRA worked an implied repeal of RICSA.

A. The Court of Appeals failed to comply with the decisions of this Court regarding repeals by implication. This Court has consistently held that "repeals by implication are disfavored . . . " *Hagen v. Utah*, 114 S. Ct. 958, 968 (1994); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *see St. Martin Evangelical Lutheran v. South Dakota*, 451 U.S. 772, 788 (1981) (absent "an affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable"); *Tennessee Valley Authority v.*

Hill, 437 U.S. 153, 189 (1978) ("the intention of the legislature to repeal must be clear and manifest;" "Only a clear repugnancy between the old . . . and the new [law] results in the former giving way . . . "). A corollary of this doctrine is the rule – recognized repeatedly in this Court's jurisprudence – that "where two statutes are 'capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective.' " *Ruckelshaus, supra*, (citations omitted).

The Court in *Morton v. Mancari*, 417 U.S. 535 (1974), confronted the interplay between a 1934 Act that established specific hiring preferences for Indians seeking employment in the Bureau of Indian Affairs, and the Equal Employment Opportunity Act of 1972, which specifically prohibited federal agencies from racial discrimination in employment. The Court reasoned that the two statutes were reconcilable when viewed in the context of similar objectives: the Indian preference law advanced opportunity for Indians to participate in self-government, and the EEO Act promoted employment opportunity for persons of all races. *Id.* at 550:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, *absent a clearly expressed congressional intention* to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . *The intention of the legislature to repeal 'must be clear and manifest.'*

Id. at 552 (citations omitted) (emphasis added). The *Mancari* Court reasoned further that the Indian preference statute was specific in nature, while the 1972 EEO Amendments were general. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* at 551-52 (citations omitted).

Mancari aptly illustrates this Court's determination to harmonize apparently conflicting statutes in order to "give effect to both if possible," *Mancari, supra,* at 552. *See generally Ruckelshaus v. Monsanto, supra,* (successfully harmonizing seemingly discordant provisions of federal insecticide law and Tucker Act). The Court pursued a similar course in *St. Martin Evangelical Lutheran v. South Dakota,* 451 U.S. 772 (1981). The Court in *St. Martin* interpreted a series of amendments to the Federal Unemployment Tax Act, 26 U.S.C. § 3301, *et seq.* The case involved the question whether church-related schools were required to pay unemployment tax for their employees. Noting that a statute "is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality," *id.* at 780, the Court recognized that the consequences of finding an implied repeal might well render the statute violative of the First Amendment. The Court reasoned that the general disfavor for implied repeals "carries special weight when an implied repeal or amendment might raise constitutional questions." *Id.* at 788.

The Court in *Watt v. Alaska,* 451 U.S. 259 (1981), harmonized two apparently inconsistent statutes that governed the distribution of revenues from the sale of certain minerals on public lands in Alaska. Although

recognizing that the later statute seemed to work substantial modification of the formula for distribution, the Court declined "to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress." *Id.* at 267. The court noted that, utilizing only a dictionary for purposes of interpretation, the language of the two statutes might be literally inconsistent. Such simplistic analysis, the Court reasoned, defeats the purpose of the two statutes and fails to comport with the rule that a construing court "must read the statutes to give effect to each if [it] can do so while preserving their sense and purpose." *Id.* at 267 (citing *Morton v. Mancari, supra*):

> [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Id. at 267 n.9 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (L. Hand, J.)).

Finding no clear congressional intention to repeal by implication, this Court in *Watt* held that the later statute in no way served to repeal the provisions of the earlier law. *Watt, supra*, 451 U.S. at 273. Of particular interest is the way in which this Court carefully examined legislative history in order to discern the meaning of the statutes involved.

In the instant case, the Court of Appeals utterly ignored this Court's repeated caveat that a reviewing court will find an implied repeal only when the intention

to repeal is "clear and manifest." *Tennessee Valley Authority v. Hill, supra.* In order to find an implied repeal in this case, the Court of Appeals deliberately cast aside clear statements that the Congress that enacted IGRA intended RICSA to remain in full force and effect. Far from finding any "clear and manifest" intent to repeal, the Court of Appeals seemed to comprehend Congress' intent to preserve RICSA. That apparent purpose notwithstanding, the Court of Appeals declined to credit the pertinent legislative history, choosing instead to chastize the legislators' apparent inability to invoke the necessary legislative incantations to achieve their desired result. App. A at 33, n.17 ("If legislative bodies desire to accomplish particular results, they must use their tools with greater care").

The Court of Appeals likewise failed to apply properly this Court's clear mandate that "where two statutes are 'capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective.' " *Ruckelshaus, supra,* (citations omitted). Having found RICSA and IGRA to be "partially repugnant" as regards gambling, the Court of Appeals claimed to harmonize them by reasoning that Rhode Island's substantial civil and criminal jurisdictional authority could be "channelled through" IGRA's compacting process. App. A at 42. Under this logic, Rhode Island – having been initially granted exceedingly broad civil and criminal jurisdiction in RICSA – after IGRA is treated in the same fashion as any other state when dealing with gambling on Indian lands within its borders. This scarcely constitutes "harmony" between the

two statutes. Indeed, the Court of Appeals colorful suggestion that IGRA "trumps" RICSA, App. A at 42, candidly exposes the true lack of harmony that remains after the court's construction.

Proper harmonization of these two statutes, the Petitioners suggest, leaves RICSA in full force and results in the conclusion that IGRA has no impact upon the Settlement Lands, because *this* Tribe could not be regarded as meeting the "having jurisdiction" predicate requirements of IGRA. Moreover, had the Court of Appeals considered RICSA in its proper context, if would have concluded that Congress certainly would not have repealed or amended RICSA without some explicit statement to that effect.

RICSA was, in effect, Congress' assent to a contractual relationship between the Tribe, the State of Rhode Island, and the federal government. A contractual relationship, incidentally, confirmed and ratified by the Department of the Interior's acceptance – contemporaneously with the IGRA debates – of a deed of trust specifically reiterating the broad and encompassing state jurisdictional grant contained in RICSA. App. H. By enacting RICSA, Congress made the United States a party to this contract between Rhode Island and the Tribe. The drafters of IGRA were surely aware of Congress' obligations as a party to such a contract and would not have lightly undertaken to abrogate the terms of such an agreement. *See, e.g., Perry v. United States*, 294 U.S. 330, 350-54 (1935) (Congress is as much bound by contracts as are individuals; one Congress having entered into such an obligation, later Congresses are bound thereby); *Lynch v. United States*, 292 U.S. 571, 579-84 (1934) (when United States is party to contract, its compliance is governed by

principles of contract law; Congress could not statutorily abrogate such contractual rights); *see Alpine Ridge Group v. Kemp*, 764 F. Supp. 1393, 1395-98 (W.D. Wash. 1990) (Congressional amendment authorizing federal agency to adjust rent formula for subsidized housing violated developers' vested contractual right in existing formula; Congress violated its duty to honor vested rights). Indeed, given the multi-dimensional aspects of the settlement between Rhode Island and the Tribe, and the federal government's intimate involvement in the adoption of RICSA, and the acceptance of the deed of trust, Congress' ability to amend RICSA without the parties' consent may well be circumscribed by its failure to reserve the power of amendment at the time of enactment. *Cf. Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (reservation or right to repeal or amend preserves right of Congress to make ex parte changes in state's role in Social Security program); *Sinking Fund Cases*, 99 U.S. (9 Otto) 700 (1879) (specific reservation or right to repeal or amend defeats claim that later enactment violated Congress' contractual obligation).

In many regards, RICSA resembles the type of bargained-for agreement contemplated by the Compact Clause. U.S. Const. Art. I, § 10, cl. 8. This clause specifically contemplates agreements among the states, or between states and foreign nations, which agreements require the assent of Congress. *Id.* "[A] Compact, when approved by Congress becomes a law of the United States, . . . but [a] Compact is, after all, a contract . . . It remains a legal document that must be construed and

applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124 (1987). *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978) (Compact clause applies to agreements entered into by state "tending to increase the political power in the States . . . ") (quoting *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976)).

Disposing as it does – for the first time in a tribal-state context – of a variety of claims regarding sovereignty and the distribution of claimed sovereign powers, the Settlement Agreement, as approved by Congress in RICSA, is quite similar in scope, operation, and effect, to a congressionally approved compact. In giving its assent to many of these multi-state compacts, Congress has, on occasion, specifically reserved to itself the right to amend or repeal said compacts. *E.g.* 18 U.S.C. App. § 7 (expressly reserving right to amend or repeal multi-state compact on pre-trial detainers); 49 U.S.C. App. § 1743 (expressly reserving right to amend or repeal multi-state agreement regarding airports); *see C.T. Hellmuth v. Washington Metro Area Trans.*, 414 F. Supp. 408, 409 (D. Md. 1976) (once approved, compact cannot be modified or otherwise altered without consent of all parties to agreement). Had Congress intended to reserve such a right to itself when it enacted RICSA, it could easily have done so.

Whether viewed as a contract, a compact, or some other hybrid form, RICSA plainly disposed of issues of sovereignty, as well as private and public property rights. Congress surely understood that any legislation that

modified the bargained-for provisions would present significant complications, some of constitutional dimensions.[3] Had Congress intended such a result, it undoubtedly would have said so explicitly, either by reserving the power to amend when it adopted RICSA, or by explicitly stating its intentions to amend in IGRA. To find such an amendment by implication, the Petitioners submit, works substantial injustice to the original parties to the Settlement Agreement as embodied in RICSA, and runs directly contrary to this Court's assertion that repeals by implication are generally disfavored, *Mancari, Watt, Monsanto,* all *supra,* and that "[t]his long-established canon of construction carries special weight when an implied repeal or amendment might raise constitutional questions." *St. Martin, supra.*

The decision of the Court of Appeals must, accordingly, be reversed.

B. The Court of Appeals Erred in Failing to Consider Pertinent Portions of Legislative History. Nearly a century ago, Dean Roscoe Pound explained the purpose of statutory construction:

> The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule, or the sense which he attached to the words wherein the rule is

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[3] The original parties to the Settlement Agreement, for example, might claim a due process violation if Congress retrenched *ex parte* from the terms that the parties had reached as part of the arms length negotiation process. Contractual claims or Compact Clause issues, might also lie.

> expressed. Its object is to enable others to derive from the language used 'the same idea which the author intended to convey.'

R. Pound, *Spurious Interpretation*, 7 Col. L. Rev. 381 (1907), reprinted in 2A *Sutherland on Statutory Construction* 549, 551 (1992 rev.). A truthful interpretation of statutory law depends upon an understanding of the legislature's underlying aim at the time of enactment. As Justice Frankfurter noted, "[s]tatutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes, or in the known temper of legislative opinion." F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527 (1947), reprinted in 2A Sutherland, *supra*, 375, at 389.

Chief Judge Breyer has pointed out that, where legislative history provides a meaningful guide to interpretation, failure to make use of committee reports and floor debates misapprehends the significance of these events in the work of Congress as a whole. S. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 855-56 (1992). Rejecting the significance of floor debate – particularly a definitive statement by the bill's author – denigrates the importance of such exchanges and may well "discourage Congress from using the regular committee, floor debate, and conference process" *id.* at 873, as an orderly means of transforming a bill into a law.

In this case the Court of Appeals, in finding a repeal by implication, failed to give weight to Congress' intended purpose as evinced by IGRA's legislative history. The Court of Appeals acknowledged that the colloquy between the principal sponsor of the bill and Rhode Island's Senators plainly stated that IGRA was not

intended to modify RICSA. Nevertheless, the court concluded that this colloquy lacked sufficient evidence of legislative intent to warrant interpreting IGRA in the manner apparently intended by the Senators. Directly contrary to the specific statements of these Senators, the court held that IGRA was fully applicable to Rhode Island, in the absence of any specific statutory language to the contrary. This reasoning, the Petitioners suggest, ignores both the specific references to Rhode Island in IGRA's legislative history, and the underlying purposes of IGRA itself.

The floor colloquy between Senator Inouye and Senators Pell and Chafee casts significant light on the drafters' understanding of IGRA's effect on Rhode Island. These Senators clearly expressed their understanding that, after IGRA, RICSA retained all of its jurisdictional vigor. App. G at 102-03, 134 Cong. Rec. S.12650 (daily ed. Sept. 15, 1988). The Court of Appeals' failure to credit such statements is inconsistent with this Court's approach in numerous cases where the Court has relied upon floor debate or colloquy involving a bill's principal sponsor as an interpretive aide in divining the meaning of a statute. *Wilder v. Virginia Hospital Association*, 496 U.S. 498 n.13 (1990) (relying in part on Sen. Boren's statements during floor debate as interpretive aids to "Boren Amendments" regarding medicaid reimbursement formulas); *Brock v. Pierce County*, 476 U.S. 253 (1986) (statement of principal sponsor during floor colloquy, when consistent with other legislative history, provides "evidence of Congress' intent"); *Regan v. Wald*, 468 U.S. 222 (1984) (relying on floor statement by relevant Subcommittee Chairman as

interpretive aid in construction of amendments to Trading With Enemy Act). Indeed, cases relied upon by the Court of Appeals actually *support* the use of floor debate as a guide to determining the intended meaning of legislative language. *Brock, supra; Weinberger v. Rossi,* 456 U.S. 25 (1982); *U.S. v. Turkette,* 452 U.S. 576 (1981).

By rejecting the utility of statements of IGRA's principal author, the Court of Appeals failed to discern that these statements regarding RICSA were actually quite consistent with the underlying purpose of IGRA itself. IGRA was, in essence, Congress' response to this Court's decision regarding commercial gambling on Indian lands in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987). The *Cabazon* Court made clear that state civil or regulatory law could be applied to tribes engaged in gambling activities on Indian lands, but only if Congress so provided. *Cabazon,* 480 U.S. at 214-15.

After *Cabazon,* Congress developed IGRA as a mechanism for the orderly delineation of tribal-state jurisdiction over gambling activities. *See* App. F at 97, Senate Select Committee Report on Indian Gaming Regulatory Act, S. Rep. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S. Code Cong. & Ad. N. 3071 *et seq.* IGRA's language and structure were based upon the well-established principle that Indian tribes retain certain attributes of sovereignty that can be relinquished to the states only by affirmative election by the tribe, and/or by congressional enactment:

> It is a long- and well-established principle of Federal-Indian law . . . that *unless authorized by an act of Congress,* the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times,

> even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to Tribal lands.
>
> * * *
>
> Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, *unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.*

App. F. at 95-6, *Id.* at 3075-76 (emphasis supplied).

Thus, the underlying theme of IGRA was Congress' desire, after *Cabazon Band*, for tribal-state concurrence. In RICSA, of course, this balance had already been struck between the Tribe and the State of Rhode Island, with the approval of Congress and general concurrence by the federal government. IGRA's compacting process – establishing a framework for tribes and states to come to agreement on the delineation of sovereignty/jurisdiction on the discrete issue of gambling – had already been completed by the Tribe and Rhode Island when they consummated their broad Settlement Agreement. That Congress understood this at the time it enacted IGRA is manifest from IGRA's legislative history.

As noted elsewhere in this Petition, the Senate Committee Report expressed unequivocal views that IGRA

would have no effect upon Indian lands that were governed by special settlement acts, such as RICSA. App. F at 100-01, *Id.* at 3082. The drafters obviously viewed this intention as so clear that it was unnecessary to include any provision in IGRA exempting Rhode Island – or any other Settlement Act state – from IGRA's effect. The statements of Senators Inouye, Pell, and Chafee were thus entirely consistent with the underlying purpose of IGRA, and, as such, were entitled to serious consideration in calculating IGRA's effect upon RICSA.

The drafters' explanation for removing a specific reference to Rhode Island is perfectly consistent with an understanding that such language was unnecessary. IGRA did not effect Rhode Island, because the type of compact contemplated in IGRA had already been negotiated between Rhode Island and the Narragansett Tribe and had received the imprimatur of all pertinent state and federal officials.

IGRA's authors undoubtedly recognized that any amendment to RICSA that interfered with or modified the bargained-for relationship between the State and the Tribe would upset the careful balance achieved in the Settlement Agreement and Congressionally approved in RICSA. Congress made clear, moreover, that it was loathe to impose such arrangements unilaterally. App. F at 95, *Id.* at 3075-76. Rhode Island and the Tribe having already arranged – with Congressional approval – such a bargained-for delineation of jurisdiction over the Settlement Lands, it strains credulity to suggest that IGRA was intended to impose a new arrangement upon the parties to that agreement. Yet this is precisely the result that follows from the Court of Appeals tortured analysis.

The Petitioners suggest that the Court of Appeals erred in failing to give proper credit to the Committee Report, the floor colloquy, and the underlying purposes of IGRA. As Senior Judge Coffin correctly discerned in his dissenting opinion:

> It seems clear to me, at least, that the legislative history in this record reveals not merely the lack of a 'clear and manifest' Congressional intent to repeal, but an affirmative intent that the pre-existing legislation should remain intact.

App. A at 49.

The Court of Appeals, in failing to give proper weight to the legislative history, erred in its interpretation of IGRA's effect upon RICSA. Said error must, accordingly, be reversed.

CONCLUSION

The Court of Appeals' erroneous interpretation of IGRA works substantial prejudice to the Petitioners, the original parties to the Settlement Agreement, and to principles of legislative interpretation generally. RICSA represented a bargained-for arrangment, imposing full effect of the State's civil and criminal laws and jurisdiction over the Settlement Lands. The Court of Appeals' conclusion that IGRA worked a repeal by implication is directly contrary to this Court's repeated assertion that such repeals are disfavored, and completely adverse to the legislative history of IGRA. As such, the decision of the Court of Appeals interferes with the careful balance

struck in the Settlement Agreement and RICSA, and constitutes a significant impingement upon the sovereignty of the State of Rhode Island. Confronted with the novel question of the interplay between a Settlement Act and IGRA, U.S. S. Ct. R. 10, the Court of Appeals' legislative interpretation conflicts with principles of statutory construction established in this Court's decided cases. *Id.* Petitioners, accordingly, pray for this Court's issuance of a writ of Certiorari to correct the Court of Appeals' erroneous decision.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 93-1400

STATE OF RHODE ISLAND, ET AL.,
Plaintiffs, Appellants,

v.

NARRAGANSETT INDIAN TRIBE, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. Raymond J. Pettine, *Senior U.S. District Judge*]

Before Selya, *Circuit Judge*,
Aldrich and Coffin, *Senior Circuit Judges*.

W. Mark Russo, with whom *Jeffrey B. Pine*, Attorney General, *Alan M. Shoer*, Special Assistant Attorney General, *Elizabeth Murdock Myers*, *Suzanne Worrell*, and *Adler, Pollock & Sheehan* were on brief, for state appellants.

Bruce N. Goodsell on brief for municipal appellants. *Scott Harshbarger*, Attorney General (Mass.), *Douglas H. Wilkins*, Assistant Attorney General (Mass.), *Michael J. Carpenter*, Attorney General (Me.), and *Frankie Sue Del Papa*, Attorney General (Nev.) on brief for States of Massachusetts, Maine, and Nevada, amici curiae.

Charles A. Hobbs, with whom *Arlene Violet*, *Matthew S. Jaffe*, and *Hobbs, Straus, Dean & Wilder* were on brief, for appellees.

March 23, 1994

SELYA, ***Circuit Judge.*** This appeal requires us to determine whether the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168 (1988) (the Gaming Act), applies to lands now held in trust by the United States for the benefit of the Narragansett Indian Tribe (the Tribe). This determination is tinged with more than the usual quotient of public interest, because the Tribe's ability to import casino gambling into Rhode Island likely hangs in the balance. After careful reconnaissance of a littered legal landscape, we set aside the district court's determination that the parties' dispute over the applicability of state jurisdiction is not yet ripe for adjudication and hold that Congress's grant of jurisdiction to the state in the Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. §§ 1701-1716 (the Settlement Act), remains valid. We also hold, contrary to the Tribe's importuning, that the grant includes civil regulatory jurisdiction.

At that juncture, the tide turns. We conclude, despite the state's vehement protests, that the Gaming Act does not specially exempt the lands in question; that the Narragansetts have concurrent jurisdiction over, and exercise governmental power with respect to, those lands, and, therefore, are entitled to invoke the Gaming Act; and that, to the extent of the jurisdictional conflict between the Settlement Act and the Gaming Act, the former is impliedly repealed. In the end, we affirm both the district court's directive that Rhode Island enter into good faith negotiations to draft a tribal-state compact under which

gaming operations can be mounted and its refusal to grant relief to various governmental figures and entities who have challenged the Tribe's entitlement to the extraordinary prophylaxis of the Gaming Act.

I. THE SETTLEMENT LANDS

We begin with a thumbnail sketch of how the land mass that is the breeding ground for this dispute came to be held in trust for the Tribe.

In the late 1970s, the Tribe asserted title claims to certain lands in Charlestown, Rhode Island, and, encountering resistance, pursued these claims in the federal courts. *See Town of Charlestown v. United States*, 696 F. Supp. 800, 801-05 (D.R.I. 1988) (recounting history of dispute), *aff'd*, 873 F.2d 1433 (1st Cir. 1989) (table). In 1978, the Tribe, the state, and the Town of Charlestown signed a joint memorandum of understanding (J-MEM) purporting to settle their differences. The Tribe agreed, *inter alia*, to the extinguishment of its title claims. In return, it obtained valuable consideration, including a lump-sum payment and effective control over roughly 1800 acres in Charlestown (the settlement lands), half donated by the state and half by private landowners.[1] The titleholders agreed to deed the property to a nascent

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[1] The provenance of the two parcels remains of continuing legal relevance because the 900 acres donated by the state may be used only for conservation purposes. *See* 6A R.I. Gen. Laws § 37-18-14 (1990). Thus, the development plan for high-stakes gambling is of necessity limited to the so-called "private" portion of the settlement lands.

corporation which would be formed to hold title for the Tribe's benefit.

Because Congress possesses plenary power over Indian matters, *see Morton v. Mancari*, 417 U.S. 535, 551-52 (1974), the parties sought its blessing. In response, Congress passed the Settlement Act, a law that, for the most part, tracks the J-MEM. In 1978, the state legislature approved the Narragansett Indian Land Management Corporation Act, 6A R.I. Gen. Laws §§ 37-18-1 to 37-18-15 (1990) (the State Act), thereby creating the nominee corporation that would hold title to the settlement lands. The necessary conveyancing followed.

The next five years passed without relevant incident. Then, in 1983, the Secretary of the Interior, acting pursuant to departmental regulations, *see* 25 C.F.R., Part 83 (1993), officially recognized the Narragansetts as an Indian tribe. *See* 48 Fed. Reg. 6177-78 (Feb. 2, 1983). On the heels of federal recognition, the settlement lands changed hands twice more. In 1985, the Rhode Island General Assembly amended the State Act to permit the holding company to transfer title to the Tribe.[2] The corporation complied. In September of 1988,

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[2] The State Act amendments themselves suggest that congressional approval of the land transfer is "required and appropriate," 6A R.I. Gen. Laws § 37-18-14, and the case law is in accord, *see Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 667-68 (1974) (explaining that, as a general rule, Indian tribes may not alienate their land without congressional consent). Yet, Congress never ratified the State Act amendments. Because the validity of the title transfer is not directly in issue in this litigation, and because appellants have not acknowledged, much less relied upon, the absence of ratification, we do not explore the consequences of this omission.

less than a month before the Gaming Act became law, the Tribe deeded the settlement lands to the federal Bureau of Indian Affairs (the Bureau) as trustee.

II. THE GAMING ACT

The Gaming Act is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands. The statute sets in place a sophisticated regulatory framework, defining a species of gambling, called "gaming," and dividing it into tiers, called "classes." Each class connotes a different level of gambling activity and, consequently, each class is regulated to a varying degree of stringency. *See* 25 U.S.C. §§ 2703(6)-2703(8).

Class I gaming – which consists, essentially, of Indian ritual gambling – always can be conducted on Indian lands. *See* 25 U.S.C. § 2710(a)(1). Class II gaming – which encompasses bingo – can be conducted as of right on Indian lands in any state, such as Rhode Island, that does not generally proscribe activities of that type. *See* 25 U.S.C. § 2710(b)(1)(A). Class III gaming – a residual category that includes what is commonly thought of as casino gambling – is permitted by compact; and, moreover, a state is obliged to negotiate such a compact in good faith with a sponsoring tribe unless the state bans all persons throughout its territory from conducting class III gaming. *See* 25 U.S.C. § 2710(d). Short of an outright ban – and few state legislatures have indicated a willingness to go that far[3] – the tribal-state compact is the exclusive method of

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[3] There are strong economic and political disincentives to an outright ban, for class III gaming encompasses, among other

regulating class III gaming. The method of the Gaming Act prevents a state from frustrating the introduction of class III gaming by an endless filibuster, for there are tight time parameters within which compact negotiations must be brought to fruition once a federal court finds that a state has failed to bargain in good faith. *See id.* § 2710(d)(7)(8). As a practical matter, then, a state ordinarily may regulate casino gambling on Indian lands only in pursuance of a consensual compact.

Because the case at bar revolves around class III gaming, the centrality of this last point cannot be overstated. One of the Gaming Act's fundamental policies is that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands. . . . " *Id.* § 2701(5). The legislative history of the statute draws out the implications of this policy:

> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance does [the Gaming Act] contemplate the extension of State jurisdiction or the application of State laws for any other purpose.

S. Rep. No. 446, 100th Cong., 2d Sess. 3, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76.

Under our tripartite system of government, Congress, not the courts, is empowered to make such policy

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things, such popular sources of state revenue as lotteries, and such familiar fundraising devices as "Las Vegas nights" to benefit churches and other charities.

choices. *See Irons v. FBI*, 811 F.2d 681, 689 (1st Cir. 1987) (acknowledging that the legislative branch sets policy by means of statutes and the courts must honor the legislature's policy choices and enforce the statutes). Thus, the courts have not focused on the wisdom of the policies underlying the Gaming Act, but have followed the legislative lead and recognized that the very structure of the Gaming Act forbids the assertion of state civil or criminal jurisdiction over class III gaming except when the tribe and the state have negotiated a compact that permits state intervention. *See, e.g., United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991); *Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 1498, 1504 (S.D. Cal. 1992).

III. PROCEEDINGS BELOW

On January 15, 1992, the Tribe formally requested that Rhode Island enter into good faith bargaining designed to produce a tribal-state compact that would allow construction and operation of a casino, *i.e.*, inauguration of class III gaming, on the settlement lands. Rhode Island declined to negotiate, instead filing suit in the federal district court.[4] The state asked the court to

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[4] As matters now stand, the named plaintiffs (appellants before us) include the state, the town, and various state and municipal officials. For simplicity's sake, we refer to the plaintiffs, collectively, as "Rhode Island" or "the State." Similarly, we refer to the defendants, collectively, as "the Narragansetts" or "the Tribe," noting, however, that plaintiffs' suit also names two tribal hierarchs as defendants.

declare that the Gaming Act does not apply to the settlement lands, and that, therefore, those lands are subject to Rhode Island's general criminal and civil laws (including its civil regulatory laws). The state also sought to enjoin the development of gambling facilities on the settlement lands and to block negotiations antecedent to a tribal-state compact. The Tribe answered and counterclaimed for declaratory and injunctive relief that would pave the way for casino gambling on the settlement lands. The tribe requested, among other things, a declaration that the state's civil regulatory laws do not apply to the settlement lands; a declaration that the Narragansetts are entitled to operate a class III casino on those lands in conformance with the Gaming Act; and a mandatory injunction commanding the state to negotiate in good faith toward a compact.

The district court considered cross motions for summary judgment premised on a joint statement of uncontroverted facts. After pondering the parties' proffers, the court deferred substantive consideration of the dispute over the general applicability of state and local jurisdiction, citing ripeness concerns. *See Rhode Island v. Narragansett Tribe of Indians*, 816 F. Supp. 796, 799-800 (D.R.I. 1993). The court then assumed, for argument's sake, that the state had been granted jurisdiction over the settlement lands by virtue of the Settlement Act. *See id.* at 804. Proceeding on that assumption, the court concluded that any such grant was "preempted" by the Gaming Act, and, consequently, had no enduring force or effect. *Id.* Based on these findings, the court ordered the state to enter into good faith negotiations to formulate a tribal-state compact. *See id.* at 806.

In reaching the conclusion that the Gaming Act controlled, the court divided its reasoning into four parts. First, it cited with approval three precedents holding that the Gaming Act overrode other federal statutes of earlier vintage. *See id.* at 801-02. Second, it found the evidence of Congress's intent to place Rhode Island beyond the Gaming Act's sphere to be unpersuasive in the absence of textual support in the statute. *See id.* at 802-04. Third, it dismissed the suggestion that the Gaming Act could not trump the Settlement Act because the former was the more general of the two statutory schemes. *See id.* at 804. Fourth, it determined that the Tribe "ha[d] jurisdiction" and "exercise[d] governmental power" over the settlement lands in sufficient measure to animate the Gaming Act. *See id.* at 805-06.

After the plaintiffs filed a timely notice of appeal, the district court stayed its order.[5]

IV. THE DECISIONAL FRAMEWORK

The search for statutory meaning inevitably reduces to a pure question of law. Thus, the issues on appeal engender *de novo* review, to be conducted without special deference to the district court's views. *See, e.g., FDIC v. Keating*, ___ F.3d ___, ___ (1st Cir. 1993) (per curiam) [No. 93-1230, slip op. at 4]; *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 757 (1st Cir. 1992). When a

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[5] The Tribe originally cross-appealed from the stay and from the denial of its motion for relief therefrom. In a separate order, we today dismiss that cross-appeal, the Tribe having failed to present any developed argumentation in support thereof.

court interprets statutes that touch on Indian sovereignty, general rules of construction apply, but they must be visualized from a distinctive perspective. The Court has described this coign of vantage:

> The underlying premise is that congressional intent will control. In determining this intent, we are cautioned to follow "the general rule that '[d]oubtful expressions are to be resolved in favor of [Indians]". . . . But the "general rule" does not command a determination . . . in the face of congressionally manifested intent to the contrary. In all cases, "the face of the Act," the "surrounding circumstances," and the "legislative history," are to be examined with an eye toward determining what congressional intent was.

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-87 (1977) (citations omitted); *see also South Carolina v. Catawba Indian Band*, 476 U.S. 498, 506 & n.16 (1986) (collecting cases).

Our search follows an odd trajectory in this case, because it starts down a road that the district court chose not to explore, and, once that journey is ended, proceeds to trace the path of an argument that ultimately proves to be a dead end. Although this approach is unorthodox, we think it facilitates a systematic testing of the appellants' core contention: that the settlement lands lie beyond the Gaming Act's reach.

The nature of our approach makes it desirable that we set out a roadmap. We propose, in the following two parts, to deal with the Settlement Act, for, if that statute

did not confer state jurisdiction in respect to the settlement lands, or if state jurisdiction, once conferred, vanished before the Gaming Act materialized, then the state's case would necessarily founder. To this end, we discuss in Part V whether the jurisdictional inquiry is ripe; finding that it is, we discuss in Part VI the validity and scope of the jurisdiction ceded to the state by the Settlement Act.

Next, we must consider the Gaming Act's effect on the state's jurisdiction. In Part VII, we deal with – and rebuff – the state's suggestion that the settlement lands are entirely exempt from the Gaming Act. In Part VIII, we deal with – and rebuff – the state's argument that, even absent a categorical exemption, the Tribe's relationship to the settlement lands does not possess the attributes needed to trigger the Gaming Act's provisions. The final curtain falls at the conclusion of Part IX, where we confront the interface between the Settlement Act and the Gaming Act, and test the district court's remedial order in the crucible of our understanding.

V. RIPENESS

The lower court declined to resolve the issue of state and local jurisdiction, finding no "case of actual controversy" sufficient to satisfy the Declaratory Judgment Act, 28 U.S.C. § 2201 (1988). *Narragansett Tribe*, 816 F. Supp at 800. Though we are mindful of the deference due to a district court's decision to withhold a grant of declaratory relief, *see El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 492 (1st Cir. 1992), we believe that the court abused its discretion in this instance.

A. The Applicable Standards.

When faced with questions of ripeness in the declaratory judgment context, this court employs the test developed in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The test, as phrased in our cases, contains two parts:

> First, we consider whether an issue is fit for review, e.g., whether a challenged government action is final and whether determination of the merits turns upon facts which may not yet be sufficiently developed. Second, we consider the question of hardship, a question which typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties.

El Dia, 963 F.2d at 495 (citation and internal quotation marks omitted); *accord W.R. Grace & Co. v. United States EPA*, 959 F.2d 360, 364 (1st Cir. 1992). The key consideration in this analysis "is the extent to which the claim involves uncertain and contingent events that may not occur as anticipated, or indeed may not occur at all." *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847 (1st Cir. 1990) (citation and internal quotation marks omitted).

Applying this test in the declaratory judgment context often requires custom tailoring, for there are at least two salient differences between declaratory actions and the mine-run of other cases: first, declaratory relief is more likely to be discretionary; and, second, declaratory actions contemplate an "*ex ante* determination of rights" that "exists in some tension with traditional notions of ripeness." *Step-Saver Data Systems, Inc. v. Wyse Technology,*

912 F.2d 643, 647 (3d Cir. 1990). Our opinion in *El Dia* responded to the first of these differences. *See El Dia*, 963 F.2d at 491-93. We believe that our opinion today responds to the second difference.

The linchpin of ripeness under the Declaratory Judgment Act, as in all Article III cases, is adverseness. In a declaratory judgment action adverseness must be appraised in a practical, common sense way. Thus, satisfying the adverseness requirement demands that "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-42 (1937). This requirement should not be applied woodenly. Most litigation has idiosyncratic features, and the adverseness criterion invites careful calibration on a case-by-case basis. The line is often difficult to draw. While a declaratory judgment should not be granted "in speculative situations," *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962), a litigant "does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev't Comm'n*, 461 U.S. 190, 201 (1982) (citation omitted).

One sound way of gauging adverseness is to evaluate the nature of the relief requested. The controversy must be such that it admits of "specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state

of facts." *Aetna Life*, 300 U.S. at 240-41. Some courts call this measure of adverseness "conclusivity" and treat it as a separate requirement. *See, e.g., Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 421-23 (3d Cir. 1992).

The second part of the ripeness inquiry evoked by declaratory judgment actions is concerned with the hardship to the parties that would result from a refusal to consider granting relief. We believe that this part of the inquiry should focus on the judgment's usefulness. Rather than asking, negatively, whether denying relief would impose hardship, courts will do well to ask, in a more positive vein, whether granting relief would serve a useful purpose, or, put another way, whether the sought-after declaration would be of practical assistance in setting the underlying controversy to rest. *See Step-Saver*, 912 F.2d at 647.

This formulation is hardly a radical departure from *Abbott Laboratories* and its progeny, for the one question may always be transformed into the other. For example, to say that denying relief is tolerable where an adequate state remedy has been realized is tantamount to saying that granting the requested relief in such a situation would be pointless. *See El Dia*, 963 F.2d at 495. Indeed, the Court some time ago observed that one reason the legal issues must be crystallized in a declaratory action is to enable the trial judge to see "some useful purpose to be achieved in deciding them." *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952). Furthermore, framing the hardship question in a positive fashion best comports with the spirit of the Declaratory Judgment Act. As Judge Becker explained: "The idea behind the Act was to clarify

legal relationships so that plaintiffs (and possibly defendants) could make responsible decisions about the future." *Step-Saver*, 912 F.2d at 649 (citing legislative history).

B. Applying the Standards.

Here, the district court's ruling on ripeness flowed from the notion that neither the state nor the town would have any occasion to exercise reserved jurisdiction until the compact negotiation process ended, thereby clearing the way for class III gaming. *Narragansett Tribe*, 816 F. Supp. at 799-800. The court seemed to focus on the uncertainty of the situation, suggesting that the need for the relief requested depended on the occurrence of speculative events. We disagree.

Whether state and local authorities retain *any* jurisdiction over the settlement lands is a question of immediate importance to all parties, separate and apart from the question of precisely what state and local jurisdiction survives. We think, in fairness to the parties, that the former question must be settled before they are ordered to commence negotiations for a tribal-state compact. Because the required interpretation of the Settlement Act projects a "purely legal" issue, *W.R. Grace*, 959 F.2d at 364, the resolution of which will not be changed by further factual development, and because it is of critical importance to the negotiation process in which the parties must engage, *see infra* Part IX(B), the case for a finding of adverseness is very powerful. And, moreover, while it is true that the compact negotiations may bear on the timing of class III gaming and the allocation of regulatory

responsibilities, the negotiations cannot effect the existence *vel non* of state and local jurisdiction.

The impetus for reaching the merits is strengthened because the other characteristics traditionally associated with ripeness are also extant. We have no serious reservation about whether the proper parties are before the court or whether the requested ruling will, if granted, conclusively define the parties' baseline legal rights. By like token, such a ruling would be of great near-term utility, facilitating the course of future tribal-state compact negotiations and clarifying to some extent the legal status of the settlement lands at a time when substantially expanded use seems highly probable. Accordingly, we rule that the basic issue of state and local jurisdiction (although not the specific, fact-intensive permutations of that issue, *see infra* Part IX(C)) is ripe for declaratory judgment purposes.

VI. STATE AND LOCAL JURISDICTION

Addressing the merits of this issue entails an examination of the validity and scope of the Settlement Act. The Act states that, with two exceptions not relevant here,[6] "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708. The Tribe maintains that this pronouncement was nugatory when made, or, if initially

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[6] The exceptions relate to the Tribe's general exemption from state taxation, 25 U.S.C. § 1715(a), and its exemption from state regulations anent fishing and hunting, 25 U.S.C. § 1706(a)(3).

effective, was relegated to the scrap heap well before Congress enacted the Gaming Act. The Tribe also maintains that, validity aside, any grant of jurisdiction excludes civil regulatory jurisdiction, and, therefore, has no bearing upon the proposed operation of the gambling casino. We are not persuaded.

A. Validity.

The Tribe's basic position is that, even prior to the Gaming Act, section 1708 of the Settlement Act did not constitute a valid conferral of jurisdiction because, until federal recognition occurred in 1983, the Tribe had no jurisdiction to relinquish.

This resupinate reasoning stands logic on its ear. The Tribe did not *surrender* jurisdiction in 1978. Rather, the Tribe, the state, and the town came to an agreement, spelled out in the J-MEM, to ask Congress, among other things, to grant jurisdiction to the state. The Tribe has articulated no reason why, regardless of its legal status, Congress lacked the power to effectuate this jurisdictional grant.

In any event, the Tribe is mistaken in its professed belief that it lacked jurisdictional power at the time of the Settlement Act. Federal recognition is just that: recognition of a previously existing status. The purpose of the procedure is to "acknowledg[e] that certain American Indian tribes exist." 25 C.F.R. § 83.2 (1993). The Tribe's retained sovereignty predates federal recognition – indeed, it predates the birth of the Republic, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) – and it

may be altered only by an act of Congress, *see Morton*, 417 U.S. at 551-52.[7]

The Tribe has two other arrows in its jurisdictional quiver. First, it hypothesizes that section 1708 did not survive federal recognition. This hypothesis is the mirror image of the hypothesis just considered: rather than being cast as the prerequisite for the conferral of jurisdiction, recognition is taken to have nullified that conferral. The two hypotheses suffer from the same infirmity. Tribal sovereignty (and, hence, jurisdiction) may be neither augmented nor diminished except through congressional enactment. Second, the Tribe suggests that, if section 1708 survived recognition, it did not survive the subsequent alienation of the settlement lands. This suggestion goes nowhere. Supposing that the jurisdictional grant contained in section 1708 could have been jettisoned by the state, the Tribe, or the Bureau without congressional sanction – a supposition we do not share –the fact is that, at every salient moment, the parties in interest took pains to reaffirm section 1708.[8] We conclude, therefore, that the

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[7] This legal principle also disposes of certain other arguments raised by the Tribe. Thus, the Tribe's sovereignty could not have been eviscerated by an act of the Rhode Island General Assembly, unratified by Congress, that purported to extinguish tribal status, *see* 1879-1880 *Acts, Resolves and Reports of the General Assembly of the State of Rhode Island and Providence Plantations*, Chap. 800, at 101-06, or by the issuance of mere administrative notices, *see, e.g.*, 48 Fed. Reg. 6177-78 (Fed. 2, 1983).

[8] The 1985 State Act amendments transferring title from the holding company to the Tribe contained a provision for state jurisdiction substantially identical to that contained in section 1708, *see* 6A R.I. Gen. Laws § 37-18-13(b); and the deeds conveying the settlement lands from the Tribe to the Bureau in 1988 explicitly confirmed the applicability of section 1708.

grant of jurisdiction contained in section 1708 of the Settlement Act was valid when made, and was undiluted at the time Congress passed the Gaming Act.

B. Scope.

Validity notwithstanding, it is an open question whether the jurisdictional grant contained in section 1708 extends to civil regulatory jurisdiction. The Tribe insists not. It tells us that the enacting Congress intended to copy the distinction between civil regulatory and civil adjudicatory jurisdiction limned two years earlier in *Bryan v. Itasca County*, 426 U.S. 373 (1976). We find this tale to be both unsupported and unsupportable.

The Tribe's argument runs along the following lines. In its view, there are salient discrepancies in respect to jurisdiction among the J-MEM, the original Senate bill leading to the Settlement Act, and the final version of the Act itself. To illustrate the Tribe's point, we list the three versions of the jurisdictional clause side by side, in order of drafting. According to three documents, the settlement lands were to be subject to:

> All laws of the state . . . including but not limited to state and local building, fire and safety codes [J-MEM, ¶ 13];
>
> The complete civil and criminal jurisdiction of the State. . . . [Joint Hearing on S.3153 and H.R. 12860, 95th Cong., 2d sess., at 36, 51 (June 20, 1978)];
>
> the civil and criminal laws and jurisdiction of the State. . . . [18 U.S.C. § 1708].

Analogizing to *Bryan*, the Tribe posits that this progression signals Congress's intent to limit the jurisdictional grant.

This proposed interpretation finds no succor in the legislative history. Without such support, we think it is evidence that the Narragansetts read too much into too little. Considering the overall context, the deviations from one document to another do not strike us as especially significant. The progressive development of the jurisdictional language can more plausibly be interpreted as intended to clarify the breadth of the grant, rather than to narrow it. Perhaps the drafters feared that "all laws of the state" might suggest regulatory jurisdiction alone, and that "civil and criminal jurisdiction" might imply only jurisdiction in the judicial sense. "Civil and criminal laws and jurisdiction" more obviously includes all sorts of jurisdiction, and can fairly lay claim to being the broadest of the three formulations.

The only change arguably suggesting a diminution in the scope of jurisdiction is the removal of the word "complete" from the draft version of the bill. We think that this change, too, may be understood as an attempt at clarification: the word "complete" could well have been removed simply to avoid any suggestion that the grant of jurisdiction was intended to be exclusive. *Cf. United States v. Cook*, 922 F.2d 1026, 1032 (2d Cir.) (suggesting that "exclusive jurisdiciton" and "complete jurisdiciton" may have the same connotation), *cert. denied*, 111 S. Ct. 2235 (1991). For that reason, the discrepant language is at best inconclusive.

The small changes in phraseology pinpointed by the Tribe, floated without visible means of support, place this case at considerable remove from *Bryan*, a case in which the Court confronted a genuinely suggestive lingual discrepancy, and interpreted the final version of the statute in line with clearly articulated legislative history. *See Bryan*, 426 U.S. at 379-87. Here, by contrast, the discrepancies that the Tribe perceives are more conjectural than suggestive; there is absolutely nothing in the legislative history of the Settlement Act that indicates congressional intent either to limit the scope of state jurisdiction or to carve a jurisdictional distinction along civil regulatory/civil adjudicatory lines.[9] Thus, *Bryan* is not a fair congener.

Our assessment is reinforced by a commonsense tenet of statutory construction. Relatively minor differences between an Indian agreement and the ratifying act of Congress needed to give it effect, without more, do not give rise to an inference that Congress intended to modify the agreement. *See Rosebud Sioux*, 430 U.S. at 599 (holding that a 1904 act of Congress did not modify a 1901 Indian agreement, despite a suggestive minor change in language). At least when an "implied continuity in purpose" exists between the antecedent agreement

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[9] We do not believe the Tribe's cause is aided by the Bureau's tentative expression of support for the position that section 1708 excludes civil regulatory jurisdiction. *See* Southeast Regional Solicitor's Memorandum Opinion (April 30, 1992). The Bureau's views are not entitled to any special weight in the interpretation of statutory provisions that it is not charged to execute. *See Crandon v. United States*, 494 U.S. 152, 177 (1990).

and the subsequently enacted statute, courts should construe the latter to effectuate the former, notwithstanding differing linguistic choices. *Id.* So it is here, for the Settlement Act was designed to implement the agreement embodied in the J-MEM. *See, e.g.*, 25 U.S.C. § 1701(d) (declaring that the J-MEM "requires implementing legislation"); Joint Hearing at 97 (acknowledging that "the legislation as drafted intends to implement the settlement agreement") (statement of Alan R. Parker, Gen. Counsel, Sen. Select Comm. on Indian Affairs).

We need not belabor the obvious. Since the self-serving inference drawn by the Tribe is plainly at odds with the discernible intention undergirding the Settlement Act, and, in the bargain, plays havoc with the statutory text, we decline gratuitously to limit the scope of section 1708 in order to parallel the holding in *Bryan*.[10] *Cf. United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986) (refusing to extend *Bryan* distinction to 18 U.S.C. § 1955, because it would be inappropriate to apply a test "developed in a different context to address different concerns"). Hence, we conclude that the Settlement Act granted civil regulatory jurisdiction, as well as civil adjudicatory jurisdiction, to the state.[11]

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[10] To the extent that the district court's opinion in *Maynard v. Narragansett Tribe*, 798 F. Supp. 94, 98-99 (D.R.I. 1992), *aff'd on other grounds*, 984 F.2d 14, 15 (1st Cir. 1993), suggests a contrary view, we reject it.

[11] Because our analysis is specific to the Settlement Act, we need not join the debate over the general applicability of the *Bryan* distinction. *See United Keetoowah Band*, 927 F.2d at 1176 n.13 (surveying debate); *see also Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292, 1294-96 (D. Ariz. 1992) (discussing applicability of *Bryan* distinction in respect to Gaming Act).

C. Local Jurisdiction.

We digress to add a few words about local jurisdiction, mindful that the Town of Charlestown and certain municipal officials are parties to this lawsuit.

Although we recognize both the town's desire to assert jurisdiction in respect to the settlement lands and the Tribe's opposition, we see nothing to be gained by giving separate treatment to the question of local jurisdiction. As a general matter, municipal authority is entirely derivative of state authority, *see* 7A R.I. Gen. Laws § 45-2-1 (1991); and in the exercise of governmental powers (as opposed to proprietary powers), municipalities act only as the agents of the state, *see Buckhout v. City of Newport*, 27 A.2d 317, 320 (R.I. 1942).

It follows that if the state chooses to cede a portion of its sovereignty to the town, the town may use that authority to the extent of the power delegated. *See, e.g., Vukic v. Brunelle*, 609 A.2d 938, 941 (R.I. 1992). But delegated powers, of necessity, cannot exceed those possessed by the delegator. The town has cited no *independent* basis upon which it might exercise municipal jurisdiction, and none is apparent to us. Thus, Charlestown's concerns are necessarily subsumed in our discussion of the state's jurisdiction.

VII. THE REACH OF THE GAMING ACT

Before addressing the Tribe's ultimate argument – that the Gaming Act cancels whatever jurisdiction the Settlement Act granted – we must first consider both

furcula of the state's assertion that the settlement lands are specifically exempted from the Gaming Act's domain.

A. The Consensual Transfer Provision.

The Gaming Act's so-called "consensual transfer" provision, familiarly known as "section 23(d)," is the site of the next battle. It states in relevant part:

> The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact . . . or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

18 U.S.C. § 1166(d). This proviso, Rhode Island asseverates, presages an exemption applicable to the settlement lands. On this theory, section 23(d) allows a state lawfully to assert civil and criminal jurisdiction over gaming under *either* a tribal-state compact *or* "any other provisions of Federal law" that embodies a consensual transfer of jurisdiction. And it portrays section 1708 of the Settlement Act as constituting such an agreed transfer.

This interpretation signifies a promiscuous elevation of hope over reason, for it completely overlooks two limitations that are apparent on the face of the statute. First, section 23(d) is a penal provision that in terms deals only with criminal prosecutions; it has no implications for civil jurisdiction (whether regulatory or adjudicatory). Second, section 23(d) pertains only to "gambling," which

is defined for purposes of that section as excluding any kind of "gaming." *See* 18 U.S.C. § 1166(c). Thus, properly understood, section 23(d) allows states to exercise jurisdiction pursuant to a consensual transfer only to enforce criminal laws that proscribe gambling activities falling outside the sanctuary of the Gaming Act. This is of no assistance to Rhode Island, which seeks to assert unfettered jurisdiction (including civil regulatory jurisdiction) over activities constituting class II and class III gaming.[12]

B. Decrypting the Legislative History.

Next, the state attempts a flanking maneuver. Without meaningful citation to the Gaming Act's text, the state hawks the proposition that Congress, in passing the Act, intended to leave intact the grant of jurisdiction tendered a decade earlier in the Settlement Act. And to fill the forensic void left by the utter absence of any statutory language to this effect, the state pushes forward carefully selected snippets of legislative history. There are two significant problems with this approach.

In the first place, courts must look primarily to statutory language, not to legislative history, in determining

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[12] The state's hopelessly mistaken interpretation of the consensual transfer provision apparently derives from a dictum in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645, 653-54 (W.D. Wis. 1990) (suggesting that the final version of section 23 was intended to exempt Rhode Island). The *Lac du Flambeau* court was misled by the Senate report's gloss on the soon-to-be-deleted Rhode Island exemption provision, *see infra* pp. 26 n.13, 31-32. The case, therefore, lacks precedential value.

the meaning and scope of a statute. *See, e.g., United States v. Turkette*, 452 U.S. 576, 580 (1981); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *United States v. Charles George Trucking Co.*, 823 F.2d 685, 688 (1st Cir. 1987); *see also* Felix Frankfurter, *The Reading of Statutes, reprinted in Of Law and Men* 60 (Philip Elman ed. 1956) (noting importance of statutory language and explaining that legislative intent "is not drawn, like nitrogen, out of the air"). When a statute's text is encompassing, clear on its face, and productive of a plausible result, it is unnecessary to search for a different, contradictory meaning in the legislative record. *See Charles George Trucking*, 823 F.2d at 688; *United States v. Meyer*, 808 F.2d 912, 915 (1st Cir. 1987); *Massachusetts Fin. Servs., Inc. v. Securities Investor Protection Corp.*, 545 F.2d 754, 757 (1st Cir. 1976), *cert. denied*, 431 U.S. 904 (1977). This is precisely such a case.

In the second place, legislative history that is in itself inconclusive will rarely, if ever, overcome the words of a statute. In a case such as this one, an inquiring court, at most, should resort to legislative history only to determine "whether there is a 'clearly expressed legislative intention' contrary to [the statutory] language, which would require [the court] to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 429, 432 n.12 (1987) (quoting *GTE Sylvania*, 447 U.S. at 108). After careful consideration of Rhode Island's extratextual arguments, we conclude that the material it musters fails to establish such a clearly expressed legislative intention.

The state begins this phase of its case by pointing to a preliminary version of the Gaming Act that contained a

provision (former section 23) safeguarding the Settlement Act from implied repeal.[13] Once that foundation is poured, the state then brings to the forefront a colloquy on the floor of the Senate involving Rhode Island's two senators, Messrs. Pell and Chafee, and Senator Inouye, sponsor and floor manager of the bill that became the Gaming Act, regarding the eventual deletion of former section 23 from the bill:

> Mr. PELL. Mr. President, I would like to thank the managers of S.555, the Indian Gaming Regulatory Act, and particularly the chairman of the Select Committee on Indian Affairs [Mr. Inouye], for their hard work and patience in achieving a consensus on this important measure.
>
> In the interests of clarity,[14] I have asked that language specifically citing the protections of the Rhode Island Claims Settlement Act (Public Law 95-395) be stricken from S.555. I understand

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[13] In the original bill, former section 23 read as follows:

> Nothing in this Act may be construed as permitting gaming activities, except to the extent permitted under the laws of the State of Rhode Island, on lands acquired by the Narragansett Indian Tribe under the Rhode Island Indian Claims Settlement Act or on any lands held by, or on behalf of, such Tribe.

134 Cong. Rec. S12,649 (daily ed. Sept. 15, 1988). After the Senate eliminated this provision it renumbered the remaining provisions. As a result, former section 23 and section 23 as enacted, 18 U.S.C. § 1166, discussed *supra* Part VII(A), bear no relation to one another.

[14] We are constrained to note that whatever interests Congress may have been serving when it deleted the former section 23, "the interests of clarity" were not among them.

> that these protections clearly will remain in effect.
>
> Mr. INOUYE. I thank my colleague, the senior Senator from Rhode Island [Mr. Pell], and assure him that the protections of the Rhode Island Claims Settlement Act (P.L. 95-395), will remain in effect and that the Narragansett Indian Tribe clearly will remain subject to the civil, criminal, and regulatory laws of the State of Rhode Island.
>
> Mr. CHAFEE. Mr. President, I too would like to thank the chairman [Mr. Inouye] and members of the Select Committee on Indian Affairs for their cooperation and assistance. The chairman's statement makes it clear that any high stakes gaming, including bingo, in Rhode Island will remain subject to the civil, criminal and regulatory laws of our State.

134 Cong. Rec. S12,650 (daily ed. Sept. 15, 1988).

Although we give full faith and credit to the earnestness of the senators involved in this exchange, we are unable to accept the colloquy at face value. In the game of statutory interpretation, statutory language is the ultimate trump card. Consequently, the overarching rule is that "statements by individual legislators should not be given controlling effect"; rather, such statements are to be respected only to the extent that they "are consistent with the statutory language." *Brock v. Pierce County*, 476 U.S. 253, 263 (1986).

This interpretive rule applies fully to the special case of statements by those members of Congress most intimately associated with a bill: its floor manager and its sponsors. The Court has so stated in unmistakable terms:

"The contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history." *Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982); *see also Brock*, 476 U.S. at 263; *GTE Sylvania*, 447 U.S. at 118; *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *cf. Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984) (explaining that remarks of a sponsor may be taken as authoritative to the extent that they are consistent with plain language).[15] Various courts of appeals, this court included, repeatedly have echoed the same theme. *See, e.g., North & South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 555 n.6 (1st Cir. 1991); *United States v. Tabacca*, 924 F.2d 906, 911 (9th Cir. 1991); *Devargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1387 (10th Cir. 1990), *cert. denied*, 498 U.S. 1074 (1991); *United States v. McGoff*, 831 F.2d 1071, 1090-91 (D.C. Cir. 1987); *Northern Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1518 (D.C. Cir. 1984).

This overarching rule makes good sense, for floor statements afford solid evidence of congressional intent only when they jibe with the final version of the statutory text. "To permit . . . clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the

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[15] While statements by legislative sponsors are sometimes described as "an authoritative guide to the statute's construction," *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (citing cases), that description is appropriate only when a statute's text leaves room for differing interpretations. *See, e.g., DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 585 (1988) ("It is the sponsors that we look to *when the meaning of the statutory words is in doubt.*") (emphasis supplied).

door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Regan v. Wald*, 468 U.S. 222, 237 (1984).

Another reason that this overarching rule makes sense is that, as a practical matter, most members of the enacting Congress will be familiar only with the bill as it stands when the vote occurs and, perhaps, with the committee reports, in broad outline of purpose; they cannot be expected to be familiar with every stray floor statement, with every twist and turn of the bill's prior history, or with every other legislator's thoughts as to what the bill accomplishes (or stops short of accomplishing). *Cf., e.g., Hirschey v. FERC*, 777 F.2d 1, 7-9 & n.1 (D.C. Cir. 1985) (Scalia, J., concurring) (observing that members of Congress cannot be held accountable for lacking knowledge of minute details in committee reports). It is particularly unrealistic to attribute knowledge of statements made on the Senate floor to House members, who gave their seal of approval to the Senate bill only after the Rhode Island exemption provision had been deleted, without mentioning Rhode Island's parochial concern. *See* 134 Cong. Rec. H8146, H8426 (daily ed. Sept. 27, 1988) (commemorating passage by the House of Representatives). For much the same reason, it is unrealistic to attribute such knowledge to the President.

In our republican form of government, legislators make laws by writing statutes – an exercise that requires putting words on paper in a way that conveys a reasonably definite meaning. Once Congress has spoken, it is bound by what it has plainly said, notwithstanding the nods and winks that may have been exchanged in floor

debates and committee hearings. After all, it is not the proper role of legislators to use unwritten assurances or side arrangements to alter the clear meaning of agreed language. And the judiciary must stand as the ultimate guarantor of the integrity of an enacted statute's text.

In sum, once Congress has spoken, a court cannot override the unambiguous words of an enacted statute and substitute for them the court's views of what individual legislators likely intended. Any other rule imports a virulent strain of subjectivity into the interpretive task and, in the process, threatens to transfer too large a slice of legislative power from Congress to the courts. *See* Frankfurter, *supra*, at 60 (warning that courts should not be "led off the trail by tests that have overtones of subjective design").

Here, the colloquy upon which the state relies is an especially slender reed because it offers an explanation of Congress's action that defies a widely accepted principle of statutory construction. When Congress includes limiting language in an early version of proposed legislation, and then rewrites the bill prior to enactment so as to scrap the limitation, the standard presumption is that Congress intended the proviso to operate without limitation. *See Cardoza-Fonseca*, 480 U.S. at 432; *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 362 n.8 (8th Cir. 1990).[16] Deletion, without more, suggests that Congress simply had a change of heart.

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[16] To be sure, it might be postulated that Congress deleted former section 23 because it feared that a specific reference to Rhode Island would give rise to the inference that other individual states with special grants of jurisdiction were not similarly

In this case, there is no "more." The state tries to buttress its argument by touting a comment in the Senate report to the effect "that nothing in the [Gaming Act] will supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act [and the Maine] Indian Claims Settlement Act." 1988 U.S.C.C.A.N. at 3082 (citations omitted). But this patch of legislative history is also threadbare. The Senate report speaks only to the bill *as reported out of committee;* it was composed *before* the deletion of the special Rhode Island exemption provision, former section 23, from the final version of the bill during floor debate. Thus, the quoted statement sheds no light on Congress's intent regarding the law it actually enacted.[17]

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exempted from the Gaming Act. Congress could have avoided such ambiguity in a myriad of ways short of striking former section 23, say, by substituting a generic exemption for a category of states including Rhode Island, or by citing Rhode Island in a nonexhaustive list of states that would be exempted. To accept the suggested rationale would be to indulge in sheer speculation.

[17] We sympathize with the predicament in which Rhode Island's senators found themselves – being asked to take the word of a powerful committee chariman [sic] – but sympathy alone cannot carry the day. Our dissenting brother puts the very best face on the state's argument, yet the dissent, though gracefully written, contains nothing to shake our view of either the controlling legal principles or the legislative history. While we plead guilty to the charge of literalism, placing strong emphasis on the statutory text is a court's proper function. *See, e.g., GTE Sylvania,* 447 U.S. at 108 (declaring that statutory language "must ordinarily be regarded as conclusive"); *Caminetti v.*

VIII. DOES THE GAMING ACT APPLY?

Our odyssey is not yet finished, as the state and the amici construct a plausible textual argument as an amulet to ward off the Gaming Act. This argument stems from the language limiting the applicability of the Gaming Act's key provisions to "[a]ny Indian tribe having jurisdiction over Indian lands," or, stated differently, to "Indian lands within such tribe's jurisdiction." *See* 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1). These are dual limitations, for one element of the definition of "Indian lands" requires that an Indian tribe "exercise[] governmental power" over them. 25 U.S.C. § 2703(4). Rhode Island claims that the Narragansetts do not "hav[e] jurisdiction" over, and do not exercise "governmental power" with respect to, the settlement lands; and, thus, that the Gaming Act does not pertain. Evaluating the state's thesis requires an exploration into another aspect of congressional intent.

United States, 242 U.S. 470, 490 (1917) (explaining that "when words are free from doubt they must be taken as the final expression of the legislative intent"). Moreover, we have made a point of considering the legislative history of the Gaming Act on its own terms, in recognition of the continuing influence of less text-based theories of statutory interpretation, such as that underpinning *Watts v. Alaska*, 451 U.S. 259 (1981). We believe that our result in compelled by any acceptable mode of interpretation.

Finally, although we share Judge Coffin's reticence to discredit responsible floor exchanges, we fail to see how a floor exchange utterly at odds with the words of an enacted statute can be given primacy in the interpretive process. If legislative bodies desire to accomplish particular results, they must use their tools with greater care.

A. Having Jurisdiction.

In the state's view, the phrase "having jurisdiction," used in the Gaming Act, must, insofar as the settlement lands are concerned, be gauged in light of the Settlement Act. We agree. But the mere fact that the Settlement Act cedes power to the state does not necessarily mean, as Rhode Island suggests, that the Tribe lacks similar power and, thus, lacks "jurisdiciton" over the settlement lands. Although the grant of jurisdictional power to the state in the Settlement Act is valid and rather broad, *see supra* Parts V(B), VI, we do not believe that it is exclusive. To the contrary, we rule that the Tribe retains concurrent jurisdiction over the settlement lands and that such concurrent jurisdiction is sufficient to satisfy the corresponding precondition to applicability of the Gaming Act.

In undertaking the task of determining whether the Settlement Act's jurisdictional grant is exclusive in nature, it must be remembered that Indian sovereignty is "a backdrop against which the applicable . . . federal statutes must be read." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973). This backdrop is a necessary adjunct to the search for legislative intent in the context of Indian-related legislation. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). Consequently, we paint the backdrop before placing the statute at center stage.

1. ***The Backdrop.*** Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local governance. *Santa Clara Pueblo*, 436 U.S. at 55, *quoting Worcester v. Georgia*, 31 U.S.

(6 Pett.) 515, 559 (1832). While tribal rights are retained at congressional sufferance and are subject to defeasance should Congress so elect, tribes retain their sovereign powers in full measure unless and until Congress acts to circumscribe them. *See United States v. Wheeler,* 435 U.S. 313, 323 (1978). As the Supreme Court has explained, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.; accord Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061, 1065-66 (1st Cir. 1979).

We believe that jurisdiction is an integral aspect of retained sovereignty. After all, the Court has held that retained sovereignty includes the power of Indians to make and enforce their own substantive law in internal matters, including matters such as membership rules, inheritance rules, and the regulation of domestic relations. *See Santa Clara Pueblo,* 436 U.S. at 56 (citing cases). Jurisdiction is cut from much the same fabric.

Of course, the shape of retained sovereignty has never been precisely defined. Thus, it cannot be said with assurance whether or not criminal, civil adjudicatory, and civil regulatory jurisdiction, in whole cloth, are aspects of retained sovereignty. But we have no need today to map such far-flung frontiers. For present purposes, so long as the portion of jurisdiction encompassed within the natural rights of the Narragansetts is substantial enough to satisfy the Gaming Act's "having jurisdiciton" prong, our inquiry is satisfied.

The state has not contended that any treaty impinges upon the Tribe's jurisdiction. By like token, the record

will not support a finding of jurisdiction abandoned or lost through implicit divestiture, *see Wheeler*, 435 U.S. at 326. We are left, then, with the relatively confined question of whether the Tribe's retained jurisdiction has been forfeited by statute. It is against this backdrop that we focus the lens of our inquiry on the Settlement Act.

2. ***The Settlement Act.*** By its terms, the Settlement Act purposes to do no more than grant jurisdiction to the state; it does not expressly strip the Tribe of jurisdiction, transfer jurisdiction from the Tribe to the state, or employ suggestive adjectives like "exclusive" or "complete" in describing the jurisdictional grant. The omission of the word "exclusive" looms particularly large in light of the use of that word elsewhere. For instance, the word is used to modify the general jurisdictional grant in 18 U.S.C. § 1162 (1988), one of the few analogous statutes granting "civil and criminal jurisdiction" over Indian lands to an individual state. Even more tellingly, the word is used in the Settlement Act itself, which characterizes as "exclusive" the grant to federal courts of jurisdiction to entertain certain constitutional challenges. 25 U.S.C. § 1711. This phenomenon commands our utmost attention, for where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (citations omitted).

We are not alone in our reluctance to infer exclusivity absent some suggestion to that effect in the statutory text. At least one other court has found the omission of words such as "exclusive" or "complete" in a similar context to

be meaningful. *See Cook*, 922 F.2d a 1026, 1032-33 (concluding from the omission of any such language that a grant to New York of jurisdiction over Indian lands, embodied in 25 U.S.C. § 232, is non-exclusive).

Comparative analysis is also instructive. We think it is sensible to compare the jurisdictional grant embedded in the Settlement Act with the jurisdictional grants encased in two other Indian claims settlement acts that were to some extent modeled after the Settlement Act. Both of the latter pieces of legislation – one involving Massachusetts, one involving Maine – contain grants of jurisdiction parallel to section 1708, expressed in similar language. *See* 25 U.S.C. § 1771g (1988); 25 U.S.C. § 1725 (1988). Yet both acts also contained corresponding limits on Indian jurisdiction, conspicuously absent from the Settlement Act. *See* 25 U.S.C. § 1771e(a); 25 U.S.C. § 1725(f). By placing stated limits on the retained jurisdiction of the affected tribes, these newer acts imply that an unadorned grant of jurisdiction to a state – such as is embodied in the Settlement Act – does not in and of itself imply exclusivity.

We find these factors to be of decretory significance. Given the strong congressional bias, especially noticeable in the past generation, against policies that would promote Indian assimilation, *see Bryan*, 426 U.S. at 387-88 & n.14, and also given Congress's fortunate penchant for great clarity when expressing its intent in this area, *see id.* at 389 ("Congress kn[ows] well how to express its intent directly when that intent [is] to subject . . . Indians to the full sweep of state laws."); *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973) (observing that Congress generally employs "clear language of express termination when

that result is desired") (collecting examples), we are of the view that acts diminishing the sovereign rights of Indian tribes should be strictly construed. So here. Since the Settlement Act does not unequivocally articulate an intent to deprive the Tribe of jurisdiction, we hold that its grant of jurisdiction to the state is non-exclusive. The Narragansetts, therefore, have made the necessary threshold showing. They retain that portion of jurisdiction they possess by virtue of their sovereign existence as a people – a portion sufficient to satisfy the Gaming Act's "having jurisdiction" prong.

B. Exercising Governmental Power.

In addition to having jurisdiction, a tribe must exercise governmental power in order to trigger the Gaming Act. Meeting this requirement does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority. Consequently, an inquiring court must assay the jurisdictional history of the settlement lands.[18] *Cf., e.g., DeCoteau v. District County Court,* 420 U.S. 425, 442 (1975).

The inquiry into governmental power need not detain us. In the post-recognition period, the Tribe has taken many strides in the direction of self-government. It

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[18] An historical perspective is also relevant to the "having jurisdiction" inquiry. A "longstanding assumption of jurisdiction . . . not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset. . . . " *Rosebud Sioux,* 430 U.S. at 604-05.

has established a housing authority, recognized as eligible to participate in the Indian programs of the federal Department of Housing and Urban Development, *see* 24 C.F.R., Part 905 (1993). It has obtained status as the functional equivalent of a state for purposes of the Clean Water Act, after having been deemed by the Environmental Protection Agency as having "a governing body carrying out substantial governmental duties and powers," 33 U.S.C. § 1377(e) (1988), and as being capable of administering an effective program of water regulation, *see* 40 C.F.R. § 130.6(d) (1993). It has taken considerable advantage of the Indian Self-Determination and Education Assistance Act (ISDA), a statute specifically designed to help build "strong and stable tribal governments." 25 U.S.C. § 450(a)(b) (1988). The Tribe administers health care programs under an ISDA pact with the Indian Health Service, and, under ISDA contracts with the Bureau, administers programs encompassing job training, education, community services, social services, real estate protection, conservation, public safety, and the like. These activities adequately evince that the Tribe exercises more than enough governmental power to satisfy the second prong of the statutory test.

IX. THE INTERFACE

Because we have concluded that the settlement lands, under the Tribe's auspices, must both prerequisites of the Gaming Act, those lands are subject to the Act's benefits and burdens. The task remaining is to determine how the Gaming Act and the Settlement Act operate in tandem.

A. Principles Governing the Interface.

In warming to this reconciliatory task, we abjure the preemption analysis undertaken below, *see Narragansett Tribe*, 816 F. Supp. at 804. The doctrine of preemption is derived from the Supremacy Clause, U.S. Const., Art VI, cl. 2, and therefore applies only to conflicts between federal provisions, on one hand, and state or local provisions, on the other hand. *See Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2617 (1992). The proper mode of analysis for cases that involve a perceived conflict between two federal statutes is that of implied repeal. *See Cook*, 922 F.2d at 1033 (rejecting preemption analysis as inappropriate in resolving a conflict between the Gaming Act and an earlier federal statute); *see also* 1A Norman J. Singer, *Sutherland on Stat. Const.* § 23.09 (5th ed. 1993). Hence, we follow that analytic path.

We start by reiterating the bedrock principle that implied repeals of federal statutes are disfavored. In the absence of a contrary legislative command, when two acts of Congress touch upon the same subject matter the courts should give effect to both, if that is feasible. *See Pipefitters Local 562 v. United States*, 407 U.S. 385, 432 n.43 (1972); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871). In other words, so long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective. *See Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988). However, "if the two [acts] are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *Tynen*, 78 U.S. (11 Wall.) at 92. Even absent outright repugnancy, a repeal may be implied in cases where the later statute covers the entire

subject "and embraces new provisions, plainly showing that it was intended as a substitute for the first act." *Id.*; *see also Posadas v. National City Bank*, 296 U.S. 497, 503-04 (1936); *Natural Resources Defense Council v. EPA*, 824 F.2d 1258, 1278 (1st Cir. 1987).[19]

The doctrine of implied repeal operates without special embellishment in the Indian law context. *See, e.g., Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055, 1058 (9th Cir.), *cert. denied*, 488 U.S. 828 (1988). The rationale for encouraging preemption in the Indian context – that the federal government is a more trustworthy guardian of Indian interests than the states – has no relevance to a conflict between two federal statutes.

B. Applying the Principles.

It is evident that the Settlement Act and the Gaming Act are partially but not wholly repugnant. The Settlement Act assigned the state a number of rights. Among those rights –

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[19] We addressed this point in *United States v. Brien*, 617 F.2d 299 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980). We caution, however, that while *Brien* suggests that statutes may never be impliedly repealed in part, *see id.* at 309, more recent cases clarify the point, *see, e.g., Bristol Energy Corp. v. New Hampshire PUC*, ___ F.3d ___, ___ (1st Cir. 1994) [No. 93-1824, slip op. at 16-17]. The rule is that, generally, there can be no partial implied repeal *absent repugnancy*. This is simply another way of stating that congressional intent to substitute a later act for an earlier one will ordinarily be implied only if the later act usurps the whole ground occupied by the first. *See Posadas*, 296 U.S. at 504. If repugnancy is found, however, then a partial repeal is in most cases preferred – indeed, mandated – for only that part of the earlier statute which is plainly anathematic should be nullified.

and by no means one of the rights at the epicenter of the negotiations leading up to the Act – was the non-exclusive right to exercise jurisdiction, in all customary respects save two, *see supra* note 6, over the settlement lands. The Gaming Act leaves undisturbed the key elements of the compromise embodied in the Settlement Act. It also leaves largely intact the grant of jurisdiction – but it demands an adjustment of that portion of jurisdiction touching on gaming.

Even in respect to jurisdiction over gaming, the two laws do not collide head-on. Thus, in connection with class III gaming, the Gaming Act does not in itself negate the state's jurisdiction, but, instead, channels the state's jurisdiction through the tribal-state compact process. It is only with regard to class I and class II gaming that the Gaming Act *ex proprio vigore* bestows exclusive jurisdiction on qualifying tribes.[20] And it is only to these small degrees that the Gaming Act properly may be said to have worked a partial repeal by implication of the preexisting statute.

In the area in which the two laws clash, the Gaming Act trumps the Settlement Act for two reasons. First, the general rule is that where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse.[21] *See Watt v. Alaska*, 451 U.S. 259, 266 (1981);

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[20] We take no view on whether, apart from the Gaming Act, a state might have regulated the activities that comprise class I gaming without violating the Free Exercise Clause.

[21] The state argues that the Settlement Act should prevail because it is the more specific statute. There are two cracks in this palladium. As noted by the court below, it is arguable which statute is the more specific. *See Narragansett Tribe*, 816 F. Supp. at

Tynen, 78 U.S. (11. Wall.) at 92; *see also* 2B Singer, *Sutherland on Stat. Const.*, *supra*, § 51.02, at 121. Second, in keeping with the spirit of the standards governing implied repeals, courts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent. Here, reading the two statutes to restrict state jurisdiction over gaming honors the Gaming Act and, at the same time, leaves the heart of the Settlement Act untouched. Taking the opposite tack – reading the two statutes in such a way as to defeat tribal jurisdiction over gaming on the settlement lands – would honor the Settlement Act, but would do great violence to the essential structure and purpose of the Gaming Act. Because the former course keeps distribution of congressional intent to a bare minimum, that reading is to be preferred.

Based on our understanding of the statutory interface, we hold that the provisions of the Indian Gaming Regulatory Act apply with full force to the lands in Rhode Island now held in trust by the United States for the Narragansett Indian Tribe.[22]

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804. More fundamentally, the canon upon which the state relies is rooted in the presumption that, when legislatures enact general laws, they do not have in mind every preexisting statute that touches on some specific aspect of the general subject. Where, as here, the enacting Congress is demonstrably aware of the earlier law at the time of the later law's enactment, there is no basis for indulging the presumption.

[22] We decline to address certain constitutional claims advanced by the amici, for these claims were not urged by the plaintiffs in the court below. According to well established authority, amici can do no more than "assist the court in achieving a just resolution of issues raised by the parties." *Lane v. First*

C. Some Unanswered Questions.

Despite this holding – a holding that resolves the case before us – it would be disingenuous to pretend that all the relevant questions have been answered. While the Tribe retains all aspects of its retained sovereignty, as that term is commonly comprehended in our jurisprudence, Congress, after having granted to the state non-exclusive jurisdiction over the settlement lands via the Settlement Act, impliedly withdrew from that grant, via the Gaming Act, the state's jurisdiction over gaming.[23] Yet, the withdrawal of jurisdiction over gaming cannot be interpreted to signify a withdrawal of *all* residual jurisdiction.

This means that the state continues to possess a quantum of regulatory authority. Of course, any effort by the state to exercise this residual authority is hedged in by barriers on both sides: on one side, by the Tribe's retained rights of sovereignty, on the other side, by the Tribe's congressionally approved authority over a specific subject matter, namely, gaming. Testing the sturdiness of one or the other of these barriers in a given case will require "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). We cannot undertake such a inquiry in the abstract, and,

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Nat'l Bank of Boston, 871 F.2d 166, 175 (1st Cir. 1989). In the court of appeals, amici cannot usurp the litigants' prerogative and introduce new issues or issues not properly preserved for appeal.

[23] It is important to note, however, that jurisdiction over class III gaming is subject to restoration, in whole or in part, as a negotiated by-product of a tribal-state compact.

thus, the jurisdictional status of the settlement lands remains ill-defined in certain respects. But that is the nature of litigation; Article III of the Constitution forbids courts from issuing advisory opinions or answering hypothetical questions. *See, e.g., International Longshoremen's & Warehousemen's Union v. Boyd,* 347 U.S. 222, 224 (1954); *United Public Workers v. Mitchell,* 330 U.S. 75, 89 (1947). Having exhausted the limits of the case in controversy, we must depart the stage, leaving it set for the possibility of future litigation.

In parting, we offer a few words of guidance. The crucial questions which must yet be answered principally deal with the nature of the regulable activities which may – or may not – be subject to state control, *e.g.,* zoning, traffic control, advertising, lodging. It is true that nondiscriminatory burdens imposed on the activities of non-Indians on Indian lands are generally upheld. *See, e.g., Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 151 (1980) (discussing tax burdens). But it is also true that a comprehensive federal regulatory scheme governing a particular area typically leaves no room for additional state burdens in that area. *See White Mountain Apache Tribe,* 448 U.S. at 148 (finding state timber regulation to be preempted). Which activities are deemed regulable, therefore, will probably depend, in the first instance, on which activities are deemed integral to gaming. Although the core functions of class III gaming on the settlement land are beyond Rhode Island's unilateral reach, the distinction between core functions and peripheral functions is tenebrous, as is the question of exactly what Rhode Island may and may not do with

respect to those functions that eventually are determined to be peripheral.

If these criss-crossing lines prove agonizingly difficult to decipher, let alone to administer, they "are no more or less so than many of the classifications that pervade the law of Indian jurisdiction." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 502 (1979). And in all events, the jurisdictional issues remain subject to further judicial intervention, pursuant to the Gaming Act, in a more fact-specific context, if the parties' compact negotiations collapse.

We can go no further at this time. We add, however, that although our opinion today answers some questions and raises others, we do not mean to encourage the protagonists to litigate *ad infinitum*. The parties' baseline power need not be defined with exactitude by judicial decree where, as here, they are compelled to enter negotiations out of which will emerge a new balance of power. The next step in the allocation of jurisdiction over gaming is in the hands of the parties, through negotiations designed to produce a tribal-state compact as contemplated by the Gaming Act, *see* 25 U.S.C. § 2710(d). If cool heads and fair-minded thinking prevail, that step may be the last.

The district court's issuance of a mandatory injunction compelling Rhode Island to commence good faith negotiation of a tribal-state compact is affirmed. The declaratory judgment entered in the district court shall, however, be modified as may be necessary to reflect the holdings contained in this opinion. Costs to appellees.

– Dissent follows –

COFFIN, *Senior Circuit Judge* (dissenting). With understandable respect for the effort evident in the court's opinion, and with full recognition of the closeness of this case, I reluctantly am unable to accept its evaluation of legislative history and its conclusion that the Gaming Act worked an implied repeal of the Settlement Act.

The court, in my view, errs in two respects. First, it invokes a generally applicable principle of statutory interpretation – statutory language, if clear, forecloses recourse to legislative history – in an area where this teaching is not so absolute, i.e., when two federal statutes, literally read, are in tension. Second, when the court deigns to consider the legislative history of the later, supposedly impliedly repealing statute, the Gaming Act, it undervalues it, characterizing it as "carefully selected snippets" that "fail[] to establish . . . a clearly expressed legislative intention." *Ante* pp. 25-26.

The most apposite recent authority of which I am aware is *Watts v. Alaska*, 451 U.S. 259 (1981), in which two federal statutes contained irreconcilably different formulae for the distribution of revenues from the lease or sale of minerals from wildlife refuges. The Court acknowledged that the consolidated cases before it "involve[d] two statutes each of which by its literal terms applies to the facts before us." *Id.* at 266. There, as here, the argument was made that the plain language of the later statute controlled and made improper any resort to legislative history.

The Court agreed that the statutory language was the starting point, but stated that "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry . . . because the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Id.* at 265-66 (citations and footnote omitted).

The Court then stated:

> Without depreciating this general rule [that the more recent of two irreconcilably conflicting statutes governs], we decline to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress. Our examination of the legislative history is guided by another maxim: " 'repeals by implication are not favored,' " *Morton v. Mancari*, 417 U.S. at 549, quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). "The intention of the legislature to repeal must be 'clear and manifest.' " *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), quoting *Red Rock v. Henry*, 106 U.S. 596, 602 (1883). We must read the statutes to give effect to each if we can do so while preserving their sense and purpose. *Mancari, supra*, at 551; see *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

Watt, 451 U.S. at 266-67.

The Court then, despite the absence of any explanation in the legislative history for adding the word "minerals" to the later legislation, after studying "the few

legislative materials pertinent," was persuaded "that Congress intended to work no change in the pre-existing framework." *Id.* at 267.

The dissenting three justices argued as does the court in this case, but they did not prevail. So far as I have been able to ascertain, *Watt* has not been eroded since its issuance.

It seems clear to me, at least, that the legislative history in this record reveals not merely the lack of a "clear and manifest" Congressional intent to repeal, but an affirmative intent that the pre-existing legislation should remain intact. An examination of the history reveals an express explanation, a deliberate, pre-planned colloquy with the floor manager of the legislation (the chairman of the Select Committee on Indian Affairs) as the very first exchange with interested Senators following his introductory presentation.

In his presentation, Senator Inouye referred both to the objective of "determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands" and affirmed the principle "that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished." 134 Cong. Rec. S12649 (daily ed. Sept. 15, 1988).

Immediately at the conclusion of the chairman's presentation, the following colloquy took place:

Mr. PELL.

Mr. President, I would like to thank the managers of S. 555, the Indian Gaming Regulatory Act, and particularly the chairman of the Select Committee on Indian Affairs [Mr. Inouye], for their hard work and patience in achieving a consensus on this important measure.

In the interest of clarity, I have asked that language specifically citing the protections of the Rhode Island Indian Claims Settlement Act (Public Law 95-395) be stricken from S. 555. I understand that these protections clearly will remain in effect.

Mr. INOUYE.

I thank my colleague, the senior Senator from Rhode Island [Mr. Pell], and assure him that the protections of the Rhode Island Indian Claims Settlement Act (P.L. 95-395), will remain in effect and that the Narragansett Indian Tribe clearly will remain subject to the civil, criminal, and regulatory laws of the State of Rhode Island.

Mr. CHAFEE.

Mr. President, I too would like to thank the chairman [Mr. Inouye] and members of the Select Committee on Indian Affairs for their cooperation and assistance. The chairman's statement makes it clear that any high stakes gaming, including bingo, in Rhode Island will remain subject to the civil, criminal, and regulatory laws of our State.

134 Cong. Rec. S12650 (daily ed. Sept. 15, 1988).

Following the colloquy other senators made comments or asked questions. A colloquy similar to that quoted above, between Senator Reid and the chairman, established the extent to which an earlier piece of legislation dealing with gambling devices would be altered by

the bill under discussion. 134 Cong. Rec. S12650 (daily ed. Sept. 15, 1988). Still another exchange concerned the scope of actions allowed under a grandfather clause. 134 Cong. Rec. S12651.

Were such responsible and calculated floor exchanges with managers of legislation to be rendered of little or no account, the character of the legislating process would suffer a substantial constriction, and a valued opportunity for clarification, minor correction, and fine tuning would be lost. I do not think the judiciary should be a party to any such result.

Certainly in the instant case, this legislative history supports the conclusion that the Rhode Island Senators thought the implied repeal language unnecessary because they did not believe that the jurisdictional provisions of the Gaming Act applied to the Settlement Act. That this accorded with the intent of the Senate seems equally clear, unless we are to proclaim this traditional kind of colloquy with leadership mere smoke and mirrors.

I think it also worth noting that the colloquy includes a statement by the bill's sponsor and floor manager, whose remarks usually are afforded substantial weight. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 526-27 (1982); *United States v. Mass. Maritime Academy*, 762 F.2d 142, 149 (1st Cir. 1985).

I add that the colloquy, although clear and to the point, is not the only evidence of Congressional intent. The Senate report also mentions that "nothing in the [Gaming Act] will supersede any specific restriction or specific grant of Federal authority or jurisdiction to a

State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act [and the Maine] Indian Claims Settlement Act." S.Rep. No. 446, 100th Cong. 2d Sess. 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082 (citations omitted). While the court concludes that the report, issued before the deletion proposed by Senator Pell, is of no present relevance, I do not think it can so easily be discounted. Rather, it seems to me entirely consistent with the colloquy with the Rhode Island senators.

If, therefore, we assign proper weight to the legislative history, I think it unavoidable that we would have to conclude that the Gaming Act had effected no implied repeal of the Settlement Act. If, of course, the Congress were to feel that an injustice had been done to appellees, it could provide a remedy through supplemental legislation.[24]

I therefore, with great reluctance, dissent.

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[24] Our circuit similarly has looked to legislative history to help resolve a conflict between a federal and a state statute. In *Local Div. 589 v. Massachusetts*, 666 F.2d 618 (1st Cir. 1981), we were asked to determine whether § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c), preempted a conflicting Massachusetts statute. The text of § 13(c) did not answer this question. Our close examination of the legislative history, however, persuaded us that Congress did not intend for this statute to preempt conflicting Massachusetts law.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

STATE OF RHODE ISLAND; BRUCE SUNDLUN, in his capacity as Governor of the State of Rhode Island; JEFFERY B. PINE, in his capacity as the Attorney General of the State of Rhode Island; TOWN OF CHARLESTON [sic]; DANIEL J. SHANLEY, JR., CAROL M. MILLER, RICHARD J. HALCHAK, J. MICHAEL DOWNEY and EVELYN SMITH, in their capacities as Members of the Charlestown Town Council,	)	C.A. No. 92-0425-P
Petitioners,	)	
v.	)	
NARRAGANSETT TRIBE OF INDIANS, GEORGE V. HOPKINS in his capacity as Chief Sachem and ANTHONY DEAN STANTON in his capacity as First Councilman,	)	
Respondents.	)	

MEMORANDUM AND ORDER

PETTINE, RAYMOND J., Senior U.S. District Judge.

In 1988, Congress passed sweeping new legislation, the Indian Gaming Regulatory Act ("the Gaming Act"), 25 U.S.C. §§2701-2721 and 18 U.S.C. §§1166-1168, "to

provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. §2702(1). The Gaming Act provides a comprehensive framework for the regulation of gambling on indian lands.

This declaratory judgment action arises from a dispute over the applicability of the Gaming Act to lands owned by the Narragansett Tribe of Indians ("the Tribe") in Charlestown, Rhode Island. In short, the parties dispute: (1) whether the Gaming Act is applicable to the Tribe's "settlement lands" in Charlestown; and (2) whether, and to what extent, the State of Rhode Island and the Town of Charlestown may exercise civil regulatory jurisdiction over the settlement lands, including jurisdiction over gaming activities.

For the reasons discussed below, I hold that the Gaming Act is applicable to the Tribe's settlement lands. I also hold that no justiciable controversy exists between the parties as to the general applicability of state and local jurisdiction over the settlement lands.

I.

The Gaming Act establishes three classes of Indian gaming activity, each subject to different levels of federal, state and tribal jurisdiction. Before an Indian Tribe may establish "Class III" gaming – or most high stakes games of chance – on their lands, the Gaming Act requires the completion of a Tribal-State compact. §2710(d)(1)(C). The Gaming Act specifies that upon receiving a request from a Tribe to negotiate a Class III gaming compact, a State

must negotiate in "good faith." §2710(d)(3)(A). If the State fails to negotiate, or does not negotiate in good faith, an Indian Tribe may initiate a cause of action in U.S. district court 180 days after an Indian Tribe's request. §2710(d)(7)(A)(i) and (B)(i).[1]

On July 15, 1992, the Narragansett Tribe served the Governor of Rhode Island with a letter requesting the State to enter negotiations to form a Class III compact to govern gambling on the Tribe's settlement lands. Shortly thereafter, petitioners filed this action for declaratory and injunctive relief under 28 U.S.C. §1331 and the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202. Specifically, petitioners request that this Court declare that: (1) the Gaming Act does not apply to the settlement lands; and (2) that those lands are subject to the criminal, civil, and civil regulatory laws of Rhode Island and the Town of Charlestown, including criminal and civil laws regulating gambling. Petitioners also ask this Court to preliminarily enjoin the Tribe from taking any action to develop or use the settlement lands not in compliance with State or local laws, and to issue an order enjoining the State and the Tribe from negotiating a Tribal-State compact under the Gaming Act.

The driving force behind this suit is petitioners' contention that the Narragansett Tribe consented to state and

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[1] If the district court finds that the State has failed to negotiate in good faith with the Tribe, the court shall order the State and Tribe to conclude a compact within 60 days. If negotiations fail during the 60-day period, each side shall submit their last best offer to a court-appointed mediator.§2710(d)(7)(B)(iii) and (iv).

local jurisdiction, including civil regulatory jurisdiction, over the settlement lands as part of a 1978 Joint Memorandum of Understanding ("JMOU") entered into by the State, the Town of Charlestown, the Tribe and private parties. Under the JMOU, the Narragansett Tribe was provided with approximately 1800 acres of settlement land in exchange for the Tribe's relinquishment of its legal claims to 3200 acres of aboriginal lands in Rhode Island. As petitioners note, the jurisdictional provisions of the JMOU were implemented by the United States Congress in the Rhode Island Indian Claims Settlement Act ("Settlement Act"), 25 U.S.C. §§1701-1716, and by the Rhode Island Legislature in the Narragansett Indian Land Management Corporations Act, as amended, R.I.G.L. §§37-18-1 – 37-18-15.[2] Among other things, §1708 of the federal Settlement Act declares that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island."[3]

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[2] The history of the settlement agreement and the acquisition of the lands is summarized in *Town of Charlestown v. United States*, 696 F.Supp. 800, 801-03 (D.R.I. 1988), *aff'd without opinion*, 873 F.2d 1433 (1st Cir. 1989).

[3] Although not relevant to the outcome of this case, the original JMOU states, in part:

> 13. That, except as otherwise specified in this Memorandum, all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands, including but not limited to state and local building, fire and safety codes.

The Narragansett Indian Land Management Corporation Act, as amended, states, in part:

> 13-18-11. Civil and criminal jurisdiction. – Except as otherwise provided, the [land management] corporation and all its authorized activities shall be subject to

According to petitioners, when Congress enacted the 1988 Gaming Act, some 10 years later, it did not intend to preempt the complete jurisdictional grant allocated to the State of Rhode Island in the 1978 Settlement Act. Rather, Congress sought to ensure that the settlement lands in Charlestown remained subject to all criminal, civil and civil regulatory laws of Rhode Island, including laws regulating gambling.

While there is no language in the Gaming Act itself that would exclude the Narragansett Tribe or the settlement lands from its coverage, petitioners point to legislative history that they believe demonstrates Congress' desire not to supersede Rhode Island's jurisdictional authority as stated in the 1978 Settlement Act. In a related argument, petitioners contend that because the Settlement Act is a more specific articulation of jurisdiction over the settlement lands, the more general provisions of the Gaming Act cannot alter the Tribe's prior agreement to be bound by State and local law, or the Settlement Act's implementation of that agreement. Finally, petitioners argue that the Tribe does not "exercise governmental powers" or possess "jurisdiction" over the

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all criminal and civil laws of the state and the town. 37.18.13. Transfer of land to Indian tribe. – . . . all real property transferred by the Narragansett Indian land management corporation to the federally recognized Narragansett Tribe of Indians pursuant to this provision:

* * *

(b) Shall be subject to the civil and criminal laws of the state of Rhode Island and the town of Charlestown, Rhode Island, except as otherwise provided herein.

settlement lands, as required by the Gaming Act. For all these reasons, petitioners contend that the Gaming Act is inapplicable to the settlement lands.

In opposition, the Tribe seeks a declaration from the Court that: (1) the settlement lands are not subject to the State's civil regulatory laws; (2) the Tribe is entitled to operate a Class III casino on their lands in conformance with the Gaming Act; and (3) the Tribe is entitled to have the State negotiate in good faith toward a Class III compact. The Tribe also requests this Court to issue a preliminary injunction ordering the State to enter into "good faith" negotiations. Both parties have moved for summary judgment.[4]

By agreement of all parties, this Court entered an order on October 6, 1992, staying the commencement of the 180-day negotiating period for the purpose of entering into a Tribal-State compact until a final written decision on the merits was entered.

II.

The Declaratory Judgment Act states that where there is "a case of actual controversy," a federal court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. §2201. There are no clear-cut criteria to determine the presence of an actual controversy. The frequently cited standard is

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[4] On November 18, 1992, the parties submitted a joint statement of undisputed facts for purposes of resolving this suit on summary judgment. All other motions are considered passed.

contained in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941): "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." According to petitioners, an actual controversy satisfying this test exists between the State, the Town of Charlestown and the Tribe concerning jurisdiction over the settlement lands, and the applicability of the Gaming Act to those lands. The respondents do not challenge the jurisdiction of this Court.

I believe there is an actual controversy in this suit, although it is narrower than that framed by petitioners. The Tribe has transmitted a letter to the State requesting the commencement of Tribal-State compact negotiations. Under the Gaming Act, the State is obligated to enter into good faith negotiations with the Tribe after receiving this request. §2710(d)(3)(A). Thus, the State is confronted with the choice of either negotiating a Tribal-State compact that it does not believe it must complete, or almost certainly facing a lawsuit by the Tribe after 180 days for failing to negotiate. To be sure, the Gaming Act does not provide an express jurisdictional basis for this action at this juncture. But I see no reason for the parties to remain idle for six months before resolving whether the Gaming Act applies to the settlement lands. This issue presents a justiciable controversy. Moreover, as noted above, the parties have consented to my stay of the commencement of the 180 day negotiating period. Obviously, the state is refusing to negotiate for the reasons I have recited – they are at an impasse, the controversy has matured, and there

is no need to delay its adjudication. *See Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1091-92 (9th Cir. 1992) (where parties failed to conclude Tribal-State compact because of disagreement over classification of "Pick Six Lotto" under Gaming Act, actual controversy existed under Declaratory Judgment Act); *Oneida Tribe of Indians v. Wisconsin*, 951 F.2d 757, 759-60 (7th Cir. 1991) (actual controversy existed under Declaratory Judgment Act where Tribal-State compact negotiations were at an impasse over meaning of the term "lotto" in the Gaming Act).

Despite this holding, I do not find that an actual controversy exists concerning state and local jurisdiction over the settlement lands, in general. As noted above, the Tribe claims that the settlement lands are not subject to the State's civil regulatory laws. In contrast, petitioners assert that the settlement lands are subject to all of the State's and Town's laws, including civil regulatory laws. Thus, it is petitioners' position "that any use and development of the lands must proceed in accordance with applicable State and local laws." Memorandum Of Law In Support Of Petitioners' Motion For Declaratory Judgment And Injunctive Relief at 6. "This dispute," petitioners argue, "has created a cloud over any future development of the Settlement Lands (including the proposed casino gambling facility) that threatens, by its very nature, to embroil the parties in litigation." *Id.* "By deciding this issue now, the Court can reduce the prospect of future litigation by defining the parameters of State and local jurisdiction over the Settlement Lands." *Id.* at 7.

With all due respect, this abstract disagreement over the applicability of state and local laws on the settlement

lands does not translate into an actual controversy. Petitioners do not allege that the Tribe is actually using or developing the settlement lands in violation of specific state or local laws. At this stage, the Tribe has simply sent a letter to the State requesting negotiations under the Gaming Act to enter into a compact. It would be premature for this Court to analyze the jurisdiction of the State and Town over the settlement lands based upon hypothetical conflicts in the future.

In sum, I conclude that there is jurisdiction with respect to the applicability of the Gaming Act to the settlement lands. All other issues raised by the parties are not ripe for decision at this time.

III.

A.

The Gaming Act boldly declares in its congressional findings that: "Indian tribes have the exclusive right to regulate gaming activities on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." §2701(5). The three separate categories of gambling under the Gaming Act are defined as follows.

Class I gaming consists of social games for minimal prizes or traditional games related to tribal ceremonies or celebrations. 25 U.S.C. §2703(6). Under the Act, Class I gaming is within the exclusive jurisdiction of Indian tribes. §2710(a)(1).

Class II gaming includes bingo and related games, as well as certain nonbanking card games. §2703(7)(A). Banking card games (including blackjack), electronic games of chance, and slot machines are expressly excluded from Class II. §2703(7)(B). Class II gaming is within the jurisdiction of the Indian Tribe, but is generally subject to oversight by the National Indian Gaming Commission. §§2710(a)(2), 2710(b) and (c).

Class III gaming comprises all forms of gambling not covered by Class I or Class II. Section 2710(d)(1) states that Class III gaming shall be lawful on "Indian lands" only if such activities are:

> (A) authorized by an ordinance or resolution that –
>
> > (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
> >
> > (ii) meets the requirements of subsection (b) of this section, and
> >
> > (iii) is approved by the Chairman [of the National Indian Gaming Commission],
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

The principal component of the Class III framework is the Tribal-State compact. The Gaming Act contemplates that the compact may include provisions allocating "criminal

and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of [State and tribal] laws and regulations" related to, and necessary for, the regulation of gambling. §§2710(d)(3)(C)(i) and (ii).

Several courts that have construed the Gaming Act have held that it preempts earlier federal laws giving states jurisdiction over Indian lands. *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991); *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp 1498 (S.D.Cal 1992); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F.Supp. 645 (W.D.Wis. 1990)[5]. These cases indicate that even where states may have had criminal or civil jurisdiction over gaming activities on Indian lands, the Gaming Act has preempted that jurisdiction.

In *Sycuan Band of Mission Indians, supra*, a district court considered the interplay between the Gaming Act and the authority of Californian authorities to criminally prosecute violations of state gaming laws on Indian lands under 18 U.S.C. §1162 (Public Law 280), a federal statute that granted six states limited jurisdiction over Indian lands. The district court determined that even if §1162 had granted the state jurisdiction over gaming activities, the Gaming Act "preempted" state authority under §1162 in the field of gaming. *Id.* at 1503-04. The Court stated that even under the stringent repeal-by-implication analysis, the Gaming Act "governs the enforcement of state gaming laws and prohibits the enforcement of these laws

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[5] Later proceedings of this case can be found at 770 F.Supp. 480 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 91 (1992).

in the absence of a tribal-state compact." *Id.* at 1504. The court added:

> . . . [the Gaming Act] creates a comprehensive jurisdictional framework for the regulation of gaming activities on Indian lands. The regulation of gaming by states outside the framework of the [Gaming Act] would frustrate this framework and Congress's careful balancing of the competing interests involved in Indian gaming.

Id. Similarly, in *Lac du Flambeau Band of Lake Superior Chippewa Indians, supra,* the court concluded that the Gaming Act "preempted" Wisconsin officials "from exercising criminal jurisdiction [under 18 U.S.C. §1162] over gaming activities on [Indian] reservations in the absence of a tribal-state compact that confers such authority on the state by agreement." 743 F.Supp. at 652.

In *United Keetoowah Band of Cherokee Indians, supra,* the Tenth Circuit found that the Gaming Act "circumscribed" application of Oklahoma laws relating to gaming under the federal Assimilative Crimes Act, 18 U.S.C. §13.[6] 927 F.2d at 1180-81. The court stated "the very structure of the [Gaming Act] permits assertion of state civil or criminal jurisdiction over Indian gaming *only* when a

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[6] The Assimilative Crimes Act reads in relevant part: (a) Whoever within or upon any [federal enclave . . . , is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment. 18 U.S.C. §13(a).

tribal-state compact has been reached to regulate class III gaming." *Id.* at 1177 (emphasis in original). These cases confirm that the Tribal-State compact process is the exclusive vehicle for state jurisdiction over Class III gaming activities under §2710(d)(1) of the Gaming Act.[7]

B.

Petitioners concede that Congress intended to "preempt the field regarding gaming activities on Indian lands throughout the country" when it enacted the Gaming Act. Memorandum of Law In Support Of Petitioners' Motion for Declaratory Judgment and Injunctive Relief at 10. But they argue that "Congress did not intend, through

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[7] The legislative history supports the proposition that states may exercise jurisdiction over such Class III gaming only through the Tribal-State compact process:

> . . . unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unitaterally (sic) impose or allow State jurisdiction on Indian lands for the regulation of gaming activities.
>
> The mechanism for facilitating the unusal (sic) relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. . . .
>
> * * *
>
> S.555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State and tribal interests to determine the extent to which various gaming activities are allowed. S. Rep. 446, *supra*, at 5-6, *reprinted in* 1988 U.S.C.C.A.N. at 3075-76.

enactment of the Gaming Act, to preempt the jurisdiction of the State of Rhode Island over the Settlement Lands that it expressly conferred on the State in 1978 through enactment of the federal Settlement Act." *Id.*

In support of their argument, petitioners quote from the Senate Select Committee report on Senate bill 555 – the bill that ultimately became the Gaming Act:

> . . . it is the intention of the Committee that *nothing* in the provision of this section or *in this act will supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in* another Federal statute, including the *Rhode Island Claims Settlement Act* (Act of September 30, 1978, 92 Stat. 813; P.L. 95-395) and the marine [sic; *read Maine*] Indian Claims settlement Act (Act of October 10, 1980; 94 Stat. 1785; P.L. 96-420).

S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082 (emphasis added). In addition, petitioners note the following colloquy on the floor of the Senate when the Gaming Act was considered[8]:

> Mr. PELL. Mr. President, I would like to thank the managers of S.555, the Indian Gaming Regulatory Act, and particularly the chairman of the Select Committee on Indian Affairs [Mr.

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[8] To alert the reader to the significance of the colloquy, a draft of the Gaming Act originally contained a Section 23, as will be discussed *infra*, specifically prohibiting gambling on the Tribe's lands "except to the extent permitted" by the State of Rhode Island. It is this section that the Senators presumably asked to be stricken.

> Inouye], for their hard work and patience in achieving a consensus on this important measure.
>
> *In the interests of clarity, I have asked that language specifically citing the protections of the Rhode Island Claims Settlement Act (Public Law 95-395) be stricken from S. 555. I understand that these protections clearly will remain in effect.*
>
> Mr. INOUYE. I thank my colleague, the senior Senator from Rhode Island [Mr. Pell], and *assure him that the protections of the Rhode Island Claims Settlement Act (P.L. 95-395), will remain in effect and that the Narragansett Indian Tribe clearly will remain subject to the civil, criminal, and regulatory laws of the State of Rhode Island.*
>
> Mr. CHAFEE. Mr. President, I too would like to thank the chairman [Mr. Inouye] and members of the Select Committee on Indian Affairs for their cooperation and assistance. The chairman's statement makes it clear that *any high stakes gaming, including bingo, in Rhode Island will remain subject to the civil, criminal, and regulatory laws of our State.*

134 Cong. Rec. S12650 (daily ed. Sept. 15, 1988) (emphasis added).

In considering petitioners' argument here, I note at the outset that the starting point for "statutory interpretation begins with the language of the statute itself." *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, ___, 110 S.Ct. 2126, 2130 (1990); *Securities Industry Ass'n v. Connolly*, 883 F.2d 1114, 1118 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990). And as the Tribe correctly notes, there is nothing in the Gaming Act that indicates

that the Narragansetts or the settlement lands are not covered by its provisions. Although not cited by petitioners, the language referred to by Senator Pell was presumably contained in Section 23 of S.555. That section read:

> SEC. 23. Nothing in this Act may be construed as permitting gaming activities, *except to the extent permitted under the laws of the State of Rhode Island,* on lands acquired by the Narragansett Indian Tribe under the Rhode Island Indian Claims Settlement Act or on any lands held by, or on behalf of, such tribe. (emphasis added).

134 Cong. Rec. S12649 (daily ed. Sept. 15, 1988). I agree with the Tribe that had this section remained in the Act, "we would have a different situation." Narragansett Tribe's Memorandum In Opposition To The State's Motion For Preliminary Injunction at 20. But Section 23 was deleted from the bill on the floor of the Senate before it was passed and signed into law.

This leaves the two pieces of legislative history. The first item to consider is the passage from the Senate report on S. 555. One circuit court has stated that committee reports generally "represent the most persuasive indicia of Congressional intent (with the exception, of course, of language of the statute itself)." *Mills v. United States,* 713 F.2d 1249, 1252 (7th Cir. 1983), *cert. denied,* 464 U.S. 1069 (1984). At the same time, another circuit court has cautioned that "[w]hile a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an *independent statutory source having the force of law." International Brotherhood of Electrical Workers, Local Union No. 474 v.*

National Labor Relations Board, 814 F.2d 697, 712 (D.C.Cir. 1987) (emphasis in original).

In the case at hand, petitioners are asking this court to interpret the Senate report as carrying the force of law where there is no textual support for their position. Even if I thought it was proper to accord such weight to the Senate report, which I do not, I find the key language inconclusive. It is unclear, for example, whether the Committee intended for the Gaming Act to have no applicability whatsoever to the Narragansett Tribe's lands.

The second fragment of legislative history is the Senate colloquy and deletion of Section 23. It is possible that Senator Pell, along with Senators Chafee and Inouye, thought that Section 23 would be redundant because they believed the 1978 Settlement Act already subjected the Tribe to Rhode Island criminal, civil and civil regulatory laws, including the State's gambling laws. But even if the Senators were correct in their interpretation of the jurisdictional reach of the Settlement Act before the passage of the Gaming Act, I believe, though my appellate brethren may not agree with me, that these stray comments alone cannot substitute for express statutory language excluding the Narragansetts or the settlement lands from the framework of the Gaming Act. Statements by individual legislators provide evidence of Congressional intent only when they are consistent with statutory language and other legislative history. *Brock v. Pierce County*, 476 U.S. 253, 263 (1986); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984); *United States v. McGoff*, 831 F.2d 1071, 1090-91 (D.C.Cir. 1987). This is true even if one of the legislators is the sponsor of the legislation. *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1387 (10th Cir.

1990), *cert. denied*, __ U.S. ___, 111 S.Ct. 799 (1991). *See also United States v. Tabacca*, 924 F.2d 906, 911 (9th Cir. 1991). Thus, neither piece of legislative history can create an exception for the Narragansett Tribe or the settlement lands without some specific language in the Gaming Act itself.[9]

C.

Petitioners' second and related argument why the Gaming Act does not apply to the settlement lands also hinges upon the 1978 settlement agreement between the Tribe, the State, the Town of Charlestown, and others, and the subsequent passage of the Settlement Act. They contend that "[t]he Gaming Act must be read . . . in light of the Tribe's agreement and consent and Congress' legislative action memorializing that agreement. As the Settlement Act is a more specific articulation of State and local jurisdiction over the Settlement Lands, the more general provisions of the Gaming Act relating to the regulation of gaming on tribal lands cannot alter the Tribe's prior agreement to be bound by State and local law or the prior federal law codifying that agreement." Memorandum In Support of Petitioners' Motion For Summary Judgment at 5-6. Petitioners' contention here relies upon the rule of

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[9] In further support of my finding here, I note the general rule that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 362 n.8 (8th Cir. 1990) (quoting *Russello v. United States*, 464 U.S. 16, 23-24 (1983)).

statutory construction that when one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, and the two cannot be reconciled, the latter statute will prevail. *See Sutherland Stat. Const.* §51.05 (5th ed. 1992).

I believe petitioners have reversed the characterization of the laws – that is, the Settlement Act is the *general* statute and the Gaming Act the *specific* statute. Thus, under the petitioners' own reasoning, the Gaming Act should prevail. But there is no need to go through this type of statutory exercise. As noted above, courts have held that the Gaming Act preempts over earlier federal laws giving states jurisdiction over Indian lands, and that states may now assert jurisdiction over Class III gaming under §2710(d)(1) of the Gaming Act only through the Tribal-State compact process. *See United Keetoowah Band of Cherokee Indians, supra; Sycuan Band of Mission Indians, supra; Lac du Flambeau Band of Superior Chippewa Indians, supra.*

I recognize that §1708 of the Settlement Act states that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. §1708. But even assuming *arguendo* that §1708 of the Settlement Act granted the State and the Town of Charlestown jurisdiction over gambling activities on the settlement lands, that jurisdictional grant is preempted by the Gaming Act in the field of gaming. The State and Town of Charlestown continue to retain whatever jurisdiction they might have over the settlement lands – an issue that I do not address in this opinion. The Gaming Act simply prohibits the State or Town from exercising jurisdiction over Class III gaming activities

under §2710(d)(1) except through the Tribal-State compact process. It is this Tribal-State compact process that the Narragansett Tribe seeks to initiate at this time.[10]

D.

In a final attempt to situate the Tribe outside the ambit of the Gaming Act, petitioners argue that the settlement lands are not "Indian Lands" as defined by the Act. Section 2703(4) of the Gaming Act states that "Indian lands" means:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe *exercises governmental power.* (emphasis added).

---

[10] For the sake of clarity, I stress that the 1978 JMOU, as implemented by the 1978 Settlement Act, should not be confused with the Tribal-State compact process delineated in the Gaming Act. As discussed above, the Tribal-State compact process is the exclusive vehicle for state jurisdiction over Class III gaming under §2710(d)(1) of the Gaming Act. While beyond the scope of this opinion, and not raised by the parties, I must note that it is possible that the State of Rhode Island, under the 1978 Settlement Act, retains some criminal jurisdiction to regulate Class III gaming activities not governed by §2710(d)(1). *See* 18 U.S.C. §1166(d).

Petitioners argue that the Tribe does not exercise "governmental power" because jurisdiction over the settlement lands is exclusively reserved to the state under §1708 of the Settlement Act. Further, they contend that the Tribe has acknowledged the authority of the state over the settlement lands in previous court proceedings. As a related argument, petitioners assert that the tribe cannot satisfy §2710(d)(3)(A) of the Gaming Act, which requires that an Indian tribe have "jurisdiction" over the lands targeted for Class III gaming.[11]

I do not find these arguments persuasive. The Tribe is federally acknowledged. 48 Fed. Reg. at 6177-78 (1983). This federal status enables the Tribe to "be eligible for

---

[11] Petitioners also halfheartedly suggest that the Tribe may not possess "powers of self-government" – one part of the Gaming Act's definition of "Indian Tribe." §2703(5). Petitioners only support for this argument is that the Tribe has not affirmatively demonstrated that it has adopted a Constitution or otherwise complied with the provision of the Indian Reorganization Act of 1934, 25 U.S.C. §461 *et seq.* This Court is unaware of any statutory or regulatory requirement that tribes have Constitutions to satisfy the "self-government" definition. Moreover, I find little merit in petitioners' argument given my finding *infra* that the Tribe "exercises governmental power" under the Gaming Act.

In addition, petitioners claim in their original Memorandum of Law (at 13) that the settlement lands do not constitute a "reservation" under §2703(4)(A) of the Gaming Act. They do not back up this contention with any support, and apparently concede the point in their subsequent Memorandum In Support Of Summary Judgment (at 14). I note that the Tribe's settlement lands were accepted into trust by the Bureau of Indian Affairs on behalf of the United States government on September 12, 1988.

services and benefits from the Federal Government available to other federally recognized tribes and entitled to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes with a *government-to-government relationship to the United States* as well as having the responsibilities and obligations of such tribes." 25 C.F.R. §83.11(a) (emphasis added). In the wake of this federal designation, several United States agencies have recognized the Tribe as a sovereign power. In 1987, for example, the U.S. Department of Housing and Urban Development confirmed that the Tribe had properly established an Indian Housing Authority eligible to participate in Indian Housing Programs. In 1989, the U.S. Environmental Protection Agency confirmed that the Tribe met the criteria required for it to be treated as a state under §106 of the Clean Water Act, 33 U.S.C. §1256 – a provision relating to federal grants for pollution control programs. According to the Tribe, it has also contracted with the Bureau of Indian Affairs and Indian Health Service to administer, manage and operate federal programs for the benefit of its members under the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §450 *et seq.*

In addition, the First Circuit has recently affirmed a finding by this Court that the Tribe possesses common law sovereign immunity from suit. *Maynard v. Narragansett Indian Tribe*, No. 92-0122 P (D.R.I. August 10, 1992), *aff'd*, No. 92-2106 (1st Cir., January 27, 1993). This sovereign immunity grows out of the recognition that "[i]ndian tribes are 'domestic dependent nations,' which exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi*

Indian Tribe, 498 U.S. 505, ___, 111 S.Ct. 905, 909 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed.25 (1931)).

While all of this does not conclusively demonstrate that the Tribe "exercises governmental power" or possesses "jurisdiction" under the Gaming Act, it points to substantial governmental authority on the part of the Tribe over its lands. Further, petitioners offer no case law or other support for the proposition that the State's or Town's jurisdiction under §1708 of the Settlement Act – even if it includes civil regulatory jurisdiction – bars the Tribe from satisfying these requirements.

"[I]t is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians." *Three Affiliated Tribes of Ft. Berthhold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 149 (1984). In the present case, this presumption helps convince me that these two ambiguous terms must be construed in favor of the Tribe. Thus, I conclude that the Narragansett Tribe "exercises governmental power" and possesses "jurisdiction" over their lands, as those terms are used in the above-cited sections of the Gaming Act.

IV.

The Gaming Act is the product of years of legislative negotiations to formulate a comprehensive scheme for regulating gaming on Indian lands. In enacting the Gaming Act, Congress sought to set in motion Indian gaming around the country within a carefully structured three-

tiered gaming classification system. The dominant feature of the Gaming Act is the Tribal-State compact mechanism. This compact process was designed by Congress to balance the interests of states in regulating high stakes gambling and the interests of indian tribes in resisting state interference on their lands.

My ruling in this case is narrow. I hold only that the Gaming Act is applicable to the Narragansett Tribe's settlement lands. Thus, under §2710(d)(3)(A) of the Act, the State of Rhode Island must now enter into good faith negotiations with the Narragansett Tribe for the purpose of forming a Class III Tribal-State compact. I decline to address the general applicability of state and local jurisdiction over the settlement lands, having found no justiciable controversy with respect to this issue.

In accordance with my October 6, 1992 Order, the commencement of the 180-day period under §2710(d)(7)(B)(i) of the Gaming Act shall begin as of the date of this opinion. At the end of 180 days, the Tribe may, if necessary, initiate a cause of action in this Court arising out of the failure of the State to enter into negotiations with the Tribe, or to conduct such negotiations in good faith. §§2710(d)(7)(A)(i) and (B)(i).

This ruling means only that the State must enter into compact negotiations with the Tribe. At least at this stage, I leave it to the parties to determine the scope of the compact negotiations, including what forms of, and

under what conditions, Class III gaming will be allowed on the settlement lands.

SO ORDERED:

/s/ Raymond J. Pettine
Raymond J. Pettine
Senior U.S. District Judge

March 4, 1993.

Entered as an order of this Court March 5, 1993.

/s/ Paulette J. Duke
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1400

STATE OF RHODE ISLAND, ET AL.,
Plaintiffs, Appellants,

v.

NARRAGANSETT TRIBE OF INDIANS, ET AL.,
Defendants, Appellees.

Before

*, ALDRICH and COFFIN,
Senior Circuit Judges,
TORRUELLA, SELYA, CYR, BOUDIN and STAHL,
Circuit Judges.

ORDER OF COURT

Entered: June 2, 1994

The panel of judges that rendered the decision in this case having voted to deny that the petition for rehearing submitted by the State of Rhode Island and the Town of Charlestown and their suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

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* Chief Judge Stephen Breyer did not participate.

It is ordered that both petition for rehearing and suggestion for rehearing en banc be denied.

By the Court:
FRANCIS P. SCIGLIANO

Clerk.

[cc: Messrs. Shoer, Goodsell, Worrell, Russo, Mullen, Violet and Hobbs]

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STATE OF RHODE ISLAND; BRUCE SUNDLUN, in his capacity as Governor of the State of Rhode Island; JAMES E. O'NEIL, in his capacity as the Attorney General of the State of Rhode Island; TOWN OF CHARLESTOWN; DANIEL J. SHANLEY, JR., CAROL M. MILLER, RICHARD J. HALCHAK, J. MICHAEL DOWNEY and EVELYN SMITH, in their capacities as Members of the Charlestown Town Council	:	C.A. NO. 92-0425-P
Petitioners	:	
v.	:	
NARRAGANSETT TRIBE OF INDIANS, GEORGE V. HOPKINS in his capacity as Chief Sachem, and ANTHONY DEAN STANTON in his capacity as First Councilman	:	
Respondents	:	

AGREED STATEMENT OF FACTS

Pursuant to Local Rule 12.1 (a), the parties hereby stipulate that the following facts are undisputed. Further, the parties agree that the documents previously attached to the Petition and Respondent's Summary Judgment Motion are genuine. The parties, however, do not stipulate as to the relevance or materiality of the submitted

documents. Further, as part of this stipulation, Petitioners submit minutes of August 26, 1988 Meeting of Charlestown, Narragansett Indian Tribe and Eastern Area: Bureau of Indian Affairs ("BIA") with the cover letter signed by B.D. Ott and a letter to Mr. Gary W. Anderson, Sr., Town Council President dated October 21, 1987 from Ross O. Swimmer, Assistant Secretary, BIA. The parties do not stipulate as to the relevance or materiality of the newly submitted documents to which Respondents have had no opportunity to reply. These documents will be denoted as Petitioner's Exhibits C and D, respectively. All Exhibits are copied and reattached to this Statement for the Court's convenience. This statement may be executed in any number of counterparts, each of which together shall constitute one instrument.

STATEMENT OF FACTS

1. In 1975, the Narragansett Tribe brought actions in this Court against the State and a myriad of private land owners seeking possession of private and public lands in the Town of Charlestown claiming aboriginal title to the lands (¶ 12 Petition, admitted by Respondent in ¶ 12 of Answer).

2. The Memorandum Of Understanding ("MOU" or "Settlement Agreement") was signed February 28, 1978, by the State Governor and others. Thomas N. Tureen, attorney for the Native American Rights Fund, signed for the Narragansett Tribe.

3. On September 30, 1978, the United States Congress implemented the MOU by enacting the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701, *et*

seq. (the "Settlement Act") (¶ 18 of Petition, admitted by Respondent in ¶ 18 of Answer).

4. In 1979, the Rhode Island General Assembly passed the Narragansett Indian Land Corporation Act, R.I. Gen. Laws § 37-18-1 *et seq.* (the "State Act"). The State Act created the Narragansett Indian Land Management Corporation.

5. In February, 1983, the United States Department of Interior, Bureau of Indian Affairs (the "BIA") issued a final determination for federal acknowledgement of the Narragansett Indian Tribe of Rhode Island. 48 Fed. Reg. 6177-78 (1983) (Respondent's Exhibit 1).

6. On or about October 11, 1985, the State of Rhode Island transferred title of the Settlement Lands from the State to the Tribe.

7. On September 12, 1988, the Bureau of Indian Affairs on behalf of the United States of America accepted into trust the Settlement Lands (Respondent's Exhibit 2).

8. On October 17, 1988, the Indian Gaming Regulatory Act became law. P.L. 100-497, 102 Stat. 2467, 25 U.S.C. § 2701 *et seq.*

9. Rhode Island allows various forms of gaming subject to State regulation.

Respectfully submitted,

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Date: *November 18, 1992*

APPENDIX E

UNITED STATES CODE ANNOTATED
CHAPTER 25-INDIANS

* * *

CHAPTER 29-INDIAN GAMING REGULATION

* * *

§ 2710 Tribal Gaming Ordinances

* * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –

(A) authorized by an ordinance or resolution that –

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the

governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that –

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian Tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian Tribe that is in effect.

(D) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any provision of this subsection –

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to

impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that –

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over –

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation

of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court –

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact

submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates –

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

(Pub.L. 100-497, § 11, Oct. 17, 1988, 102 Stat. 2472.)

APPENDIX F

INDIAN GAMING REGULATORY ACT

P.L. 100-497, see page 102 Stat. 2467

DATES OF CONSIDERATION AND PASSAGE

House: September 27, 1988

Senate: September 15, 1988

Senate Report (Indian Affairs Committee)
No. 100-446,
Aug. 3, 1988 [To accompany S. 555]

Cong. Record Vol. 134 (1988)

No House Report was submitted with this legislation.

SENATE REPORT NO. 100-446

* * *

STATEMENT OF POLICY

The regulation of gaming activities on Indian lands has been the subject of much controversy. Representatives of States with experience in regulating some forms of gaming activities, such as Nevada and California, have expressed concern over the potential for the infiltration of organized crime or criminal elements in Indian gaming activities. The criminal division of the U.S. Department of Justice has expressed similar concerns, although as stated in the additional views of Senator John McCain, in 15 years of gaming activity on Indian reservations, there has never been one clearly proven case of organized criminal activity.

Recognizing that the extension of State jurisdiction on Indian lands has traditionally been inimical to Indian

interests, some have suggested the creation of a Federal regulatory agency to regulate class II and class III gaming activities on Indian lands. Justice Department officials were opposed to this approach, arguing that the expertise to regulate gaming activities and to enforce laws related to gaming could be found in state agencies, and thus that there was no need to duplicate those mechanisms on a Federal level.

It is a long- and well- established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands.

In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land. The committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with

the United States, and that today, tribal governments retain all rights that were not expressly relinquished.

Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unitaterally [sic] impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.

The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does S. 555 contemplate the extension of State jurisdiction or the application of State laws for any other purpose. Further, it is the Committee's intention that to the extent tribal governments elect to relinquish rights in a tribal-State compact that they might have otherwise reserved, the relinquishment of such rights shall be specific to the tribe so making the election, and shall not be construed to extend to other tribes, or as a general abrogation of other reserved rights or of tribal sovereignty.

It is also true that S. 555 does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absense [sic] of a tribal-State compact. In adopting this position, the Committee has carefully considered the law enforcement concerns of tribal and State governments, as well as those of the Federal Government, and the need to fashion a means by

which differing public policies of these respective governmental entities can be accommodated and reconciled. This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied.

S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.

Finally, the Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*. Under Public Law 83-280, the prohibitory/regulatory distinction is used to determine the extent to which State laws apply through the assertion of State court jurisdiction on Indian lands in Public Law 280 States. The Committee wishes to make clear that, under S. 555, application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83-280. Here the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of

Federal law, to either allow or prohibit certain activities. The Committee does not intend for S. 555 to be used in any way to subject Indian tribes or their members who engage in class II games to the criminal jurisdiction of States in which criminal laws prohibit class II games.

* * *

EXPLANATION OF MAJOR PROVISIONS

* * *

Class III gaming is defined in section 4(9) as all gaming that is not included as class I or class II. All class III gaming will be subject to the terms and conditions of Tribal-State compacts agreed to under section 11(d).

Full-time Commissioners. – Section 5(b) provides that the five Commission members shall serve on a full-time basis. Under the bill the Commission's principle [sic] responsibilities are with class II gaming and it will participate only minimally in the regulation of class III gaming. The Committee retained the full-time service provision on the premise that, at least for the initial start-up phase of the Commission, such full-time service will be required. However, the Committee notes that section 7(c) requires the Commission to submit a report to Congress on December 31, 1989, that will include recommendations on whether Commissioners should serve full or part time.

Transition. – Section 10 of the bill requires the Secretary of the Interior to continue to exercise his trust responsibility for Indian tribes in supervising gaming activities on Indian lands until the Commission is fully functioning.

Jurisdiction. – Class I. – Section 11(a)(1) provides that traditional or ceremonial Indian gaming remains within the exclusive jurisdiction of Indian tribes and is not subject to any regulation pursuant to the act. Indian tribes engage in traditional gaming activities such as the "stick" or "bone" games that are played by tribes in conjunction with ceremonies, pow wows, feasts or other celebrations. These activities are not covered by this legislation. Similarly, where rodeos, horse races, or other kinds of gaming with purses or prizes, have traditionally been held in conjunction with such activities for members and guests, including publicly invited guests, such games are not to be considered class II or class III gaming for purposes of this legislation.

Class II. – Section 11(a)(2) stipulates that class II gaming remains within tribal jurisdiction but is subject to the provisions of the act where two conditions are met: The State within which the tribe is located must permit such gaming for any purpose by any entity; and such gaming is not otherwise prohibited by Federal law. The Committee recognizes that tribal jurisdiction over class II gaming has not been previously addressed by Federal statute and thus there has heretofore been no divestment or transfer of such inherent tribal governmental powers by the Congress.

There are five States (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that criminally prohibit any type of gaming, including bingo. S. 555 bars any tribe within those States, as a matter of Federal law, from operating bingo or any other type of gaming. In the other 45 States, some forms of bingo are permitted and tribes with Indian lands in those States are free to operate bingo on Indian

lands, subject to the regulatory scheme set forth in the bill. The card games regulated as class II gaming are permitted by far fewer States and are subject to requirements set forth in section 4(8). The phrase "for any purpose by any person, organization or entity" makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.

The phrase "not otherwise prohibited by Federal Law" refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175. That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto. It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands. The Committee specifically notes the following sections in connection with this paragraph: 18 U.S.C. section 13, 371, 1084, 1303-1307, 1952-1955 and 1961-1968; 39 U.S.C. 3005; and except as noted above,m [sic] 15 U.S.C. 1171-1178. However, it is the intention of the Committee that nothing in the provision of this section or in this act will supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act (Act of September 30, 1978, 92 Stat. 813; P.O. 95-395) and

the Marine [sic] Indian Claim Settlement Act (Act of October 10, 1980; 94 Stat. 1785; P.L. 96-420).

APPENDIX G

PROCEEDINGS AND DEBATES OF THE 100TH CONGRESS, SECOND SESSION, VOL. 134, NO. 127

* * *

CONGRESSIONAL RECORD – SENATE

S12650 *September 15, 1988*

* * *

Mr. INOUYE * * * It is also true that S. 555 does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-State compact. In adopting this position, the committee has carefully considered the law enforcement concerns of tribal and State governments, as well as those of the Federal Government, and the need to fashion a means by which differing public policies of these respective governmental entities can be accommodated and reconciled. This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied. S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands and accordingly I urge my colleagues to adopt this important legislation, so that we may bring a final resolution to the much-debated issue of the regulation of the conduct of gaming activities on Indian lands.

Mr. PELL. Mr. President, I would like to thank the managers of S. 555, the Indian Gaming Regulatory Act, and particularly the chairman of the Select Committee on Indian Affairs [Mr. INOUYE], for their hard work and patience in achieving a consensus on this important measure.

In the interests of clarity, I have asked that language specifically citing the protections of the Rhode Island Indian Claims Settlement Act (Public Law 95-395) be stricken from S. 555. I understand that these protections clearly will remain in effect.

Mr. INOUYE. I thank my colleague, the senior Senator from Rhode Island [Mr. PELL], and assure him that the protections of the Rhode Island Indian Claims Settlement Act (P.L. 95-395), will remain in effect and that the Narragansett Indian Tribe clearly will remain subject to the civil, criminal, and regulatory laws of the State of Rhode Island.

Mr. CHAFEE. Mr. President, I too would like to thank the chairman [Mr. INOUYE] and members of the Select Committee on Indian Affairs for their cooperation and assistance. The chairman's statement makes it clear that any high stakes gaming, including bingo, in Rhode Island will remain subject to the civil, criminal, and regulatory laws of our State.

* * *

APPENDIX H

DEED Book 102-Page 383

KNOW ALL MEN BY THESE PRESENTS, that the NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND, P.O. BOX 268, Charlestown, RI 02813, for good and valuable consideration, does hereby grant, bargain, remise, release and forever convey unto the UNITED STATES OF AMERICA AS GRANTEE IN TRUST FOR THE NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND it successors and assigns forever, with WARRANTY COVENANTS, all the right title, interest, claim and demand which the said NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND now has or of right ought to have, or claim, in and to that parcel or tract of land situated in the Town of Charlestown, County of Washington, in the State of Rhode Island, bounded and described as follows:

> Beginning at a maple tree near the Tyas Bridge, so-called, being the northeasterly corner of land conveyed by Charles Cross to George F. Burdick by deed dated December 28, 1867 and recorded in the office of the Town Clerk of the town of Charlestown in Deed Book 9 at Page 270, and running thence in a southeasterly direction bounding southwesterly on said; Burdick land along the westerly side of a cart path or old Indian Trial to a stake and stones and land now or formerly of Othniel Wilcox et al; thence turning and running northeasterly bounding southeasterly on said last named land to Deep Pond, so-called; thence turning and running in a northerly direction on a meandering line bounding easterly on Deep Pond till it comes to land sold by Charles Cross to Henry A. Barker by deed dated June 29, 1898 and

recorded in said office in Book 13 at Page 467; thence turning and running is a northwesterly direction bounding northeasterly on said Barker land to a point in the shore of School House Pond, sometimes called Cockawpawg Pond, where the Kings Factory Brook, so-called, connects with said Pond; thence turning and running in a southwesterly direction bounding northwesterly on land now or formerly of Henry Champlin and in part on land of said Burdick to said maple tree at Tyas Bridge and the point and place of beginning; said last course following the center line of said Brook.

TOGETHER WITH all the right, title and interest of the Grantor in and to said Deep Pond, Cockawpawg Pond and Kings Factory Brook and the waters of the same, and TOGETHER WITH right of way to School House Pond as reserved in deed from Charles Cross to Henry A. Barker dated June 29, 1898 and recorded in Charlestown Record Book 13 at Page 467. Said premises are conveyed subject to any existing or used right-of-ways or ancient trails across said property.

Being the same premises conveyed by Deed from Benjamin C. Gavitt and wife, Bessie C. Gavitt to State of Rhode Island and Providence Plantations, dated September 30, 1957 and recorded October 2, 1957 at 10:05 a.m.

TO HAVE AND TO HOLD the same, with all right, privileges and appurtenences thereunto appertaining, unto and to the use of it the said NARRAGANSETT INDIAN TRIBE, its successors and assigns forever.

TOGETHER WITH and subject to all easements and restrictions as set forth in Title 37, Chapter 18, Section 14 of the Rhode Island General Laws as amended.

IN WITNESS WHEREOF said NARRAGANSETT INDIAN TRIBE has caused these presents to be executed by its governing council this 7th day of January, 1987.

NARRAGANSETT INDIAN TRIBE

BY: /s/ David R. Mars
Dawn Dove
Kim Hazard
Robert B. Thomas
"Hungery Boss" Freeman [sic]
Nancy H. Pakron [sic]
Benjamin Sekaton
Joseph B. Monroe Jr.
Wilbur Stanton

In Presence Of:

/s/ Grace M. Dowdell

STATE OF RHODE ISLAND

County of Washington

In Charlestown, as the 7th day of January, 1987 before me personally appeared the above persons, being the Chief Sachem and Indian Council of said NARRAGANSETT INDIAN TRIBE to be known and known by me to be the parties executing the foregoing instrument, and they acknowledged said instrument, by them executed, to be their free acts and deeds, their free acts and deeds in their Tribal governmental capacities and the free act and deed of said NARRAGANSETT INDIAN TRIBE.

/s/ Rogeriee Thompson
Notary Public
Rogeriee Thompson

Pursuant to the delegation from the Assistant Secretary – Indian Affairs to the Eastern Area Director, the undersigned hereby accepts the lands conveyed by this deed on behalf of the United States of America pursuant to Section 5 of the Indian Reorganization Act (Act of June 18, 1934, C. 576, 48 STAT. 986, 25 U. S. C. 465). This action does not alter the applicability of state law conferred by the Rhode Island Indian Claims Settlement Act, Public Law 95-395, 25 U. S. C. 1701 et. seq.

/s/ B. D. Ott
B. D. Ott
Area Director
Eastern Area Office

9-12-88
Date

Book 102-Page 385

IN WITNESS WHEREOF said NARRAGANSETT INDIAN TRIBE has caused these presents to be executed by its governing council this 7th day of January, 1987

NARRAGANSETT INDIAN TRIBE

BY: /s/ David R. Mars
Chief-Sachem

BY: /s/ Dawn Dove
First Councilperson

In Presence Of:

/s/ Grace M. Dowdell

STATE OF RHODE ISLAND

County of Washington

In Charlestown, on the 7th day of January, 1987 before me personally appeared David R. Mars and Dawn

Dove being the Chief Sachem and First Councilperson respectively of said NARRAGANSETT INDIAN TRIBE to be known and known by me to be the parties executing the foregoing instrument, and they acknowledged said instrument, by then executed, to be their free acts and deeds, their free acts and deeds in their Tribal governmental capacities and the free act and deed of said NARRAGANSETT INDIAN TRIBE.

/s/ Rogeriee Thompson
Notary Public

RECEIVED FOR RECORD ON SEPTEMBER 13, 1988
AT 11:05 A.M. AND RECORDED BY:

/s/ Jodi P. Bacon (NAR)
Deputy Town Clerk

DEED Book 102-Page 396

THE NARRAGANSETT INDIAN TRIBE of Rhode Island, a federally recognized Indian Tribe having a mailing address of P.O. Box 268, Charlestown, Rhode Island 02813, for consideration paid, grant to THE UNITED STATES OF AMERICA AS GRANTEE IN TRUST for the NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND with WARRANTY COVENANTS

> Those certain tracts or parcels of land, with any buildings and improvements thereon, situated in the Town of Charlestown, County of Washington and State of Rhode Island which are

fully described in EXHIBIT A, which is attached hereto and made a part hereof, and which tracts were conveyed to the within Grantor by the following Deeds:

PARCEL I: Deed of Archibald B. Kenyon, Jr., et als., dated March 13, 1981.

PARCEL II: Deed of Edna Mae Reed dated March 26, 1981.

PARCEL III: Deed of Franklin Shores, Inc. dated April 13, 1981.

PARCEL IV: Deed of David Giuliano dated June 25, 1982.

PARCEL V: Deed of Raymond A. Hazard dated June 25, 1982.

PARCEL VI: Deed of Carl M. Richard dated March 16, 1984.

PARCEL VII: Deed of Hope W. Hallock and Edna May McKenzie dated November 23, 1979.

PARCEL VIII: Deed of Providence Boys' Club dated November 27, 1979.

PARCEL IX: Deed of Greater Providence Young Men's Christian Association dated November 26, 1979.

PARCEL X: Deed of Robert E. Cherry dated November 23, 1979.

MEANING AND INTENDING to convey all of the premises of the within Grantor situated in said Town of Charlestown and containing, by estimation, 900 acres of land, more or less.

Consideration for this conveyance is such that no documentary stamps are required.

IN WITNESS WHEREOF said NARRAGANSETT INDIAN TRIBE has caused these presents to be executed of its governing council this 7th day of January, 1987.

NARRAGANSETT INDIAN TRIBE

BY: /s/ David R. Mars
Dawn Dove
Kim Hazard
Robert B. Thomas
"Hungery Boss" Freeman [sic]
Nancy H. Pakron [sic]
Benjamin Sekaton
Joseph B. Monroe Jr.
Wilbur Stanton

In Presence Of:

/s/ Grace M. Dowdell

STATE OF RHODE ISLAND

County of Washington

In Charlestown, on the 7th day of January, 1987 before me personally appeared the above persons, being the Chief Sachem and Indian Council of said NARRAGANSETT INDIAN TRIBE to be known and known by me to be the parties executing the foregoing instrument, and they acknowledged said instrument, by them executed, to be their free acts and deeds, their free acts and deeds in their Tribal governmental capacities and the free act and deed of said NARRAGANSETT INDIAN TRIBE.

/s/ Rogeriee Thompson
Notary Public
Rogeriee Thompson

Book 102-Page 397

IN WITNESS WHEREOF said NARRAGANSETT INDIAN TRIBE has caused these presents to be executed by its governing council this 7th day of January, 1987

NARRAGANSETT INDIAN TRIBE

BY: /s/ David R. Mars
Chief-Sachem

BY: /s/ Dawn Dove
First Councilperson

In Presence Of:

/s/ Grace M. Dowdell

STATE OF RHODE ISLAND

County of Washington

In Charlestown, on the 7th day of January, 1987 before as personally appeared David R. Mars and Dawn Dove being the Chief Sachem and First Councilperson respectively of said NARRAGANSETT INDIAN TRIBE to be known and known by me to be the parties executing the foregoing instrument, and they acknowledged said instrument, by them executed, to be their free acts and deeds, their free acts and deeds is their Tribal governmental capacities and the free act and deed of said NARRAGANSETT INDIAN TRIBE.

/s/ Rogeriee Thompson
Notary Public
Rogeriee Thompson

Pursuant to the delegation from the Assistant Secretary – Indian Affairs to the Eastern Area Director, the undersigned hereby accepts the lands conveyed by this deed on behalf of the United States of America pursuant to Section 5 of the Indian Reorganization Act (Act of June 18, 1934, C. 576, 48 STAT. 986, 25 U. S. C. 465). This action does not alter the applicability of state law conferred by the Rhode Island Indian Claims Settlement Act, Public Law 95-395, 25 U. S. C. 1701 et. seq.

/s/ B. D. Ott — 9-12-88

B. D. Ott — Date

Area Director

Eastern Area Office

APPENDIX I

[SEAL]

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

OCT 21, 1987

Mr. Gary W. Anderson, Sr.
Town Council President
Town of Charlestown
P.O. Box 849
Charlestown, Rhode Island 02813

Dear Mr. Anderson:

On January 21, 1987, you wrote to the Department requesting a response to several issues that are connected with the application of the Narragansett Tribe to have certain lands placed in trust. Each issue you raised in your letter is addressed below.

1. *Abrogation of Prior Agreement and Rhode Island Statute.* On September 30, 1978, Congress enacted P.L. 95-395, the Rhode Island Indian Claims Settlement Act. This law was intended to implement those provisions of the settlement agreement reached by the parties in *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al.,* and *Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management* which required Federal legislation in order to become effective. The Rhode Island Indian Claims Settlement Act required the State to enact the statute (R.I. Gen. Laws, 1956 section 37-18-1 et seq.) you referred to in your letter of January

21, 1987, as a prerequisite to the extinguishment of the Tribe's land claims.

I understand that the Tribe has submitted an application to the Bureau's Eastern Area Office requesting that the settlement lands be placed in trust with the United States. The application has not been received yet by my office. When the application is ready for my review, it will be evaluated in the context of P.L. 95-395. The Tribe's application will not be approved if it is determined that placing the settlement lands into trust is inconsistent with or will violate the terms of P.L. 95-395.

Concerning the tax status of the settlement lands, the Act exempts the settlement lands from taxation by the Federal, State or local jurisdictions, but does not extend the exemption to income-producing activities on the settlement lands. In addition, the Act does not require the Tribe or the State Corporation to make payments in lieu of taxes for services provided to the settlement lands, but does not prohibit the State Corporation from doing so. I understand that the State Legislature has repealed portions of R.I. Gen. Laws 37-18-2, et seq. These factors will be taken into account as we evaluate the Tribe's application for trust status.

2. *Jurisdiction.* The Settlement Agreement between the parties provided that " . . . all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands, including but not limited to state and local building, fire and safety codes." P.L. 95-395 included a section to implement this element of the settlement which provides "Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and

criminal laws and jurisdiction of the State of Rhode Island." See 25 U.S.C. 1708. We will take this provision of P.L. 95-395 and the corresponding legislative history into consideration when the Tribe submits its trust application to us for action.

3. *Land Use.* P.L. 95-395 is silent on the issue of the land use plan. However, House Report 95-1453 on P.L. 95-395 notes that the provision making acquisition of the settlement lands conditioned upon the adoption of a land use plan was eliminated in order to simplify the settlement process, and that at the hearing on the bill the parties agreed that use of the lands, rather than acquisition of the land, should be conditioned on acceptance of the land use plan by the town council. These circumstances and conditions will be taken into account in our deliberation on the Tribe's application for trust status.

4. *Stability of the Narragansetts.* On June 30, 1987, the parties in *Narragansett Indian Tribe v. Hodel* entered a Consent Judgment before the United States District Court for the District of Columbia which should enhance the political stability of the tribal community. In the Consent Judgment, the present officers and Councilmembers are recognized by the Federal government as the governing body of the Tribe, January 1988 is established as the date for the tribal election for all officers and Councilmembers, and a mechanism is provided for updating the tribal membership roll and determining eligible voters for the upcoming election. I encourage the Town to continue efforts to develop a meaningful working relationship with the governing body of the Tribe.

5. *Gambling.* P.L. 95-395 (See 25 U.S.C. 1708) appears to resolve any doubt about the applicability of state laws on settlement lands. Consistent with the Act and its legislative history, it is our determination that any gambling activities on the settlement lands must conform to state laws. It should be noted that a proposed rule was published in the Federal Register on June 23 which if enacted as a final rule would restrict taking lands in trust and reservation status for gaming purposes.

I hope this information will be useful to the Town of Charlestown. Once the Tribe's application for trust status for the settlement lands is transmitted from the Eastern Area Office to my office for review and action, we will review it pursuant to the regulations at 25 CFR Part 151, and in consideration of the provisions and limitations in the Rhode Island Indian Claims Settlement Act.

Sincerely,

/s/ Ross O. Swimmer
Ross O. Swimmer
Assistant Secretary –
Indian Affairs

APPENDIX J

UNITED STATES CODE ANNOTATED
TITLE 25-INDIANS

* * *

CHAPTER 19-INDIAN CLAIMS SETTLEMENTS WITH STATES

* * *

SUBCHAPTER I – RHODE ISLAND INDIAN CLAIMS SETTLEMENT

PART A – GENERAL PROVISIONS

§ 1701. Congressional findings and declaration of policy

Congress finds and declares that –

(a) there are pending before the United States District Court for the District of Rhode Island two consolidated actions that involve Indian claims to certain public and private lands within the town of Charlestown, Rhode Island;

(b) the pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits;

(c) the Congress shares with the State of Rhode Island and the parties to the lawsuits a desire to remove all clouds on titles resulting from such Indian land claims within the State of Rhode Island; and

(d) the parties to the lawsuits and others interested in the settlement of Indian land claims within the State of Rhode Island have

executed a Settlement Agreement which requires implementing legislation by the Congress of the United States and the legislature of the State of Rhode Island.

(Pub.L. 95-395, § 2, Sept. 30, 1978. 92 Stat. 813.)

* * *

§ 1708. Applicability of State law

Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

(Pub.L. 95-395, § 9, Sept. 30, 1978. 92 Stat. 817.)

APPENDIX K

RHODE ISLAND INDIAN CLAIMS SETTLEMENT ACT

P.L. 95-395, see page 92 Stat. 813

House Report (Interior and Insular Affairs Committee) No. 95-1453, Aug. 8, 1978 [To accompany H.R. 12860]

Senate Report (Indian Affairs Committee). No. 95-972, July 11, 1978 [To accompany S. 3153]

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

House September 12, 1978

Senate July 21, September 15, 1978

The House bill was passed in lieu of the Senate bill. The House Report is set out.

HOUSE REPORT NO. 95-1453

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 12860) to settle Indian land claims within the State of Rhode Island and Providence Plantations, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * *

PURPOSE

The purpose of H.R. 12860, introduced by Mr. Beard for himself and Mr. St Germain, is to implement a settlement agreement between the Narragansett Indian Tribe and the State of Rhode Island and private landowners in Charlestown, Rhode Island concerning the tribe's claim to certain land within the town of Charlestown and for damages for trespass on such lands.[1]

Briefly, the Tribe claims aboriginal title to these lands and argues that the alienation of tribal lands by the Tribe under the auspices of the State of Rhode Island between 1790 and 1880 was null and void under the Trade and Intercourse Act of 1790, as amended and supplemented (25 U.S.C. 177). Under the terms of the settlement agreement, the Tribe would relinquish its claim in return for approximately 900 acres of land from the State and an additional 900 acres of land from private landowners, the latter to be purchased with $3.5 million from the Federal government. Both extinguishment of the Tribe's claims and purchase of the private lands, as well as other provisions, requires legislation by the Congress. Additional implementing legislation by the State is required as well.

H.R. 12860 provides for the extinguishment of all land claims of the Narragansett Tribe and for the conditional extinguishment of all land claims, if any, within the State of Rhode Island, by any other Indian tribes; provides for the purchase of the private settlement lands by

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[1] Similar Senate bill, S. 3153, passed the Senate on July 21, 1978, and is pending before the committee.

the Federal government on behalf of the Tribe as provided in the settlement agreement; and implements various other provisions of the settlement agreement, thereby eliminating any cloud on the title to claimed lands while assuring that the Tribe is adequately compensated for the extinguishment of its claims to the land.

Background

On January 8, 1975, the Narragansett Indian Tribe filed two actions in the United States District Court for the District of Rhode Island against the Director of the Rhode Island Department of Environmental Management and a number of private landowners seeking possession of approximately 3,200 acres of public and private land in Charlestown, Rhode Island. The Tribe alleged that it owned and occupied these lands as a portion of its aboriginal territory and reservation and that in about 1880 these lands were alienated under the auspices of the State of Rhode Island in violation of the Trade and Intercourse Act of 1790, as amended and supplemented. The Trade and Intercourse Act, the final 1834 version of which was codified in R.S. § 2116, 25 U.S.C. 177, provides inter alia:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Therefore, the Tribe claims that since the alienation of tribal lands was not approved by the Federal government as required by the Trade and Intercourse Act and the

Tribe's aboriginal title to the lands has never been extinguished, the Tribe has superior title to the lands as against the state and private landowners who trace their title back to the unapproved, allegedly illegal transfer in 1880.

The lawsuits were consolidated into a single action and the Tribe won a favorable ruling on a preliminary motion to strike certain defenses raised by the state and private landowners. Meanwhile, the pendency of the lawsuits resulted in economic hardship for the residents of Charlestown by clouding titles to most of the land within the town, including lands not subject to the lawsuits.

On February 28, 1978, after lengthy negotiations, the parties to these lawsuits, along with Governor Garrahy and the Charlestown Town Council, signed a settlement agreement to resolve the Tribe's claims out of court. This settlement agreement, the original of which has been filed with the Rhode Island Secretary of State and a copy of which is included in the appendix of this report, sets forth a number of provisions which would form the basis for a legislative resolution of the Tribe's claim based upon the consent of all parties.

Under the settlement agreement, the State would enact legislation creating a state-chartered, Indian-controlled corporation with an irrevocable charter for the purpose of permanently holding and managing the settlement lands in trust for the Narragansett Indians. (Paragraphs 1, 8.) The settlement lands include approximately 900 acres of state-owned land within the claims area and approximately 900 acres of privately-held land specified

in schedules A and B of the agreement. The public settlement land (subsequently appraised at a value of as much as $2.7 million) would be conveyed by the state without compensation. The private settlement lands would be purchased at fair market value via an option mechanism with $3.5 million contributed by the Federal Government. (Paragraphs 2, 3, 5.)

The settlement agreement also provided that development and use of the settlement lands would be governed under a land use plan mutually acceptable to the Charlestown Town Council and the state-created corporation and incorporated into the town zoning ordinance. Under the land use plan, all of the public settlement lands and 75 percent of the private settlement lands would be permanently held for conservation purposes. (Paragraphs 12, 14.) The settlement lands were also to be subject to a special Federal restraint against alienation and exempt from Federal, state, and local taxation, except with respect to "in lieu" payments for governmental services provided by the town with respect to the lands. (Paragraphs 7, 9, 16.) All laws of the state were agreed to continue in full force and effect on the settlement lands, but the state-created corporation was to be given authority to establish its own hunting and fishing regulations on the settlement lands (after consultation with state officials and consistent with minimum standards for the safety of persons and protection of fish and wildlife). (Paragraphs 11, 13.)

In return for the public and private settlement lands under the settlement agreement, the Narragansetts agreed to cause their lawsuits to be dismissed with prejudice and consented to the extinguishment by the Federal

government of all Indian claims for possession of land (and all potential damages based on their land claims) within Rhode Island, which would clear non-Indian title to non-settlement lands claimed by the Tribe. (Paragraphs 6, 19.)

Finally, the settlement agreement provided for the payment by the Federal Government of legal fees and expenses incurred by certain private defendants in the lawsuits, retention by the State of benefits under certain federal laws, deferral of capital gains on income of private defendants from the sale of private settlement lands, and non-recognition of the tribe for the purpose of receiving Federal services as a result of the legislation. (Paragraphs 4, 10, 15, 17.) Except for the extinguishment of the Narragansett claims, the dismissal of the lawsuits and the payments of attorney fees, the provisions of the settlement agreement were predicated upon a prompt determination by the Secretary (subject to judicial review) that the Tribe had a credible claim to the lands involved in the lawsuits. (Paragraph 18.)

Summary of Major Provisions

This bill represents the first legislation submitted to the Congress which would resolve the land claims of an Indian tribe arising under the Trade and Intercourse Act of 1790, as amended and supplemented, on the basis of an out-of-court settlement negotiated between the Tribe and the affected parties. The committee is convinced that this legislation will serve as a landmark for the resolution of other land claims by eastern tribes under the Trade and Intercourse Act.

* * *

APPENDIX L

[LOGO]

STATE OF RHODE ISLAND &
PROVIDENCE PLANTATIONS

DEPARTMENT OF THE ATTORNEY GENERAL

PROVIDENCE COUNTY COURT HOUSE

PROVIDENCE

JULIUS C. MICHAELSON
ATTORNEY GENERAL

June 1, 1978

The Honorable Robert F. Burns
Secretary of State
State House
Providence, RI 02903

Re: Narragansett Indian Land Claim Settlement Agreement

Dear Mr. Secretary:

Enclosed please find an original, executed "Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims."

I am forwarding this document to you with the request that it be duly filed and recorded in the Office of the Secretary of State.

Thank you for your attention to this matter.

Very truly yours,

/s/ Julius C. Michaelson
JULIUS C. MICHAELSON
ATTORNEY GENERAL

JCM:JC
Enclosure

JOINT MEMORANDUM OF UNDERSTANDING CONCERNING SETTLEMENT OF THE RHODE ISLAND INDIAN LAND CLAIMS

All parties to *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al*, C.A. No. 75-0006 (USDC, DRI) and *Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management*, C.A. No. 75-0005 (USDC, DRI) (together called "the Lawsuits") and the other undersigned persons interested in the settlement of Indian land claims within the State of Rhode Island hereby agree to the following principles and provisions of settlement which are, except for the provisions of Section 18 below, to be considered as inseparable, dependent requirements and which are all conditioned upon requisite, favorable and timely action by the appropriate executive and legislative branches of the governments of the State of Rhode Island and the United States of America:

1. That a state chartered corporation (the "State Corporation") will be created with an irrevocable charter for the purpose of acquiring, managing and permanently holding the lands defined in Sections 2 and 3 below (the "Settlement lands"); the State Corporation will be controlled by a board of directors, the majority whose members will be chosen by a Rhode Island corporation known as "The Narragansett Tribe of Indians" (the "Indian Corporation") or its successor and the remaining members chosen by the State of Rhode Island.

2. That the State of Rhode Island will contribute the Indian Cedar Swamp, the Indian Burial Hill, the land around Deep Pond, and an easement from Kings Factory Road to Watchaug Pond to the State Corporation. These

public portions of the Settlement Lands total approximately 900 acres. Contribution of the State land around Deep Pond is subject to the restrictions set forth below in Section 17.

3. That the Settlement Lands will also include approximately 900 acres of land located within the area outlined in red on the map attached hereto marked Exhibit A. The Settlement Lands shall specifically include those lands held by the defendants named in the Lawsuits which are enumerated on the schedule attached hereto as Exhibit B. These privately held portions of the Settlement Lands shall be acquired at fair market value established without regard to the pendency of the lawsuits. No private landowner shall be required to convey any land hereunder without his or her consent, which shall be deemed to have been given upon execution of a mutually acceptable option agreement (the "Option"). Any landowner executing an Option shall be paid a nonrefundable option fee by the federal government equal to 5% of the purchase price for a 2-year option. The optionee shall have the right to renew the option for one additional year for a renewal fee paid by the federal government of 2.5% of the purchase price.

4. That the parties to the Lawsuits will support efforts to obtain deferral of both state and federal income taxes resulting from the conveyance of privately held portions of the Settlement Lands.

5. That the federal government will provide the funds, in an amount not in excess of 3.5 million dollars, to acquire the privately held portions of the Settlement Lands.

6. That Federal legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island, and effectively clears the titles of landowners in Rhode Island of any such claim. This Federal legislation shall be in form and substance as set forth in the proposed statutory language attached hereto as Exhibit C, unless otherwise agreed by counsel for the private Defendants in the Lawsuit. This legislation shall not purport to affect or eliminate the claim of any individual Indian which is pursued under any law generally applicable to non-Indians as well as Indians in Rhode Island.

7. That the Settlement Lands shall be subject to a special federal restriction against alienation, provided that nothing in the federal restriction or in any other aspect of this memorandum shall affect the ability of the State Corporation to grant or otherwise convey (whether voluntary or involuntary, including any eminent domain or condemnation proceedings) easements for public or private purposes.

8. That the Settlement Lands will be held in trust by the State Corporation for the benefit of the descendants of the 1880 Rhode Island Narragansett Roll.

9. That the Settlement Lands will not be subject to local property taxation.

10. That the federal government will reimburse the private defendants in the lawsuits for costs incurred or paid for legal services and disbursements in connection with the lawsuits with respect to any lands involved in the Lawsuits which are not specified in Exhibit B and for which an Option is not executed.

11. That the State Corporation will have the right (after consultation with appropriate state officials) to establish its own regulations concerning hunting and fishing on the Settlement Lands without being subject to state regulations, but shall impose minimum standards for safety of persons and protection of wildlife and fish stock.

12. All the Settlement Lands contributed by the State will be permanently held for conservation purposes by the State Corporation.

13. That, except as otherwise specified in this Memorandum, all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands, including but not limited to state and local building, fire and safety codes.

14. That all settlement lands will be subject to a professionally prepared land use plan (the "Land Use Plan") mutually acceptable to the State Corporation and the Town Council. Acceptance of the Land Use Plan shall not be unreasonably withheld by the Town Council. At least seventy-five percent of the Settlement Lands not already committed to conservation purposes by Section 12 above will be permanently subjected to conservation uses by the Land Use Plan. Town Council acceptance of the Land Use Plan shall be a condition precedent to the acquisition of the Settlement Lands by the State Corporation. The Town Council, after its acceptance of the Land Use Plan, shall amend the Zoning ordinance of the Town of Charlestown in a manner consistent with the Land Use Plan as it applies to the Settlement Lands. Thereafter, the zoning ordinance, as amended to conform with the Land

Use Plan, shall control the use of the Settlement Lands and shall not be further amended in a manner inconsistent with the Land Use Plan without the consent of the State Corporation.

15. That the plaintiff in the Lawsuits will not receive Federal recognition for purposes of eligibility for Department of the Interior services as a result of Congressional implementation of the provisions of this Memorandum, but will have the same right to petition for such recognition and services as other groups.

16. That the Town of Charlestown will be reimbursed for future services provided in connection with the Settlement Lands with funds provided by the Indian corporation.

17. That contribution by the State of the land around Deep Pond is conditioned upon required and appropriate Federal approval of any conveyance of said land in such manner so as not to affect, in any adverse manner, any benefits received by the State under the Pittman-Robertson Act (16 U.S.C. § 669-669i) and the Dingell-Johnson Act (16 U.S.C. § 777-777k), and further conditioned upon the retention of permanent State control of and public access to an adequate fishing area within said land.

18. That implementation of all provisions of this Memorandum, except those of Sections 6, 10 and 19, and the payment of the option fees provided for in Section 3 above shall be contingent upon a prompt determination by the Department of the Interior that the Plaintiff in the Lawsuits have a credible claim to the lands involved in

the Lawsuits. Plaintiff shall have an opportunity for judicial review of any adverse determination by the Department of the Interior.

19. The Plaintiffs in the Lawsuits agree to cause the Lawsuits to be dismissed with prejudice at the time the portion of the Federal legislation which eliminates title problems pursuant to Section 6 above becomes effective.

WITNESS the execution hereof under seal as of this twenty-eighth day of February, 1978.

HONORABLE J. JOSEPH GARRAHY,
Governor of State of Rhode Island
and Providence Plantations

/s/ J. Joseph Garrahy

TOWN OF CHARLESTOWN,
RHODE ISLAND TOWN
COUNCIL

By /s/ Charles McLean

PLAINTIFF: NARRAGANSETT TRIBE OF INDIANS,
By their attorneys,
NATIVE AMERICAN RIGHTS FUND

By /s/ Thomas N. Tureen
Thomas N. Tureen

DEFENDANTS: EDWARD WOOD, RHODE ISLAND DIRECTOR OF ENVIRONMENTAL MANAGEMENT

By /s/ Wm. G. Brody
William Granfield Brody,
Assistant Attorney General.
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(David F. Giuliano
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their attorneys,

By /s/ Donald P. Quinn
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(Robert E. Cherry
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(Alice Johnson
(Ethel W. Duguid
(Providence Boys Club
(Greater Providence Young Mens
(Christian Association
(Sarah J. Browning
(William F. Arnold
(Ruth Arnold
(Thomas L. Arnold
(William Arnold
(Frank W. Arnold
(Thomas L. Arnold, William
(Arnold, Frank W. Arnold
(and the Washington Trust
(Company as trustees for
(the Estate of Frank Arnold
(Thomas L. Arnold, Laurence
(Whittemore and the
(Washington Trust Company
(as trustees for the
(Thomas L. Arnold Trust
(Hope W. Hallock

(Edna May McKenzie
(Lloyd E. Fitzgerald
(Joyce M. Fitzgerald
(Edward A. Whipple
(Pauline Whipple

By TILLINGHAST, COLLINS & GRAHAM,
their attorneys,

By /s/ James A. Jackson

SOUTHERN RHODE ISLAND LAND DEVELOPMENT CORP.,
By its attorney,

By /s/ Archibald B. Kenyon, Jr.
Archibald B. Kenyon, Jr.

FRANKLIN SHORES, INC.,
by its attorney,

By /s/ John P. Toscano, Jr.
John P. Toscano, Jr.

EDNA MAE REED, by her attorney,

By /s/ Harold B. Soloveitzik
Harold B. Soloveitzik

CARL M. RICHARD, by his attorney,

By /s/ Francis Castrovillari
Francis Castrovillari

OLD STONE BANK, by its attorney,

By /s/ Frank Ray
Frank Ray

OLD COLONY CO-OPERATIVE BANK, by its attorney,

By /s/ Archibald B. Kenyon, Jr.
Archibald B. Kenyon, Jr.

[Exhibits to Document Omitted in Printing]

Supreme Court, U.S.
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No. 94-68

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; JEFFREY B. PINE, in his capacity as Attorney General of the State of Rhode Island; TOWN OF CHARLESTOWN; ROBERT J. SCHIEDLER, CHARLES W. BECK, CHARLENE Q. DUNN, FORRESTER C. SAFFORD, and J. MICHAEL DOWNEY, in their capacity as Members of the Charlestown Town Council,

Petitioners

v.

NARRAGANSETT INDIAN TRIBE, GEORGE H. HOPKINS, in his capacity as Chief Sachem, and ANTHONY DEAN STANTON, in his capacity as First Councilman,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-68

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; JEFFREY B. PINE, in his capacity as Attorney General of the State of Rhode Island; TOWN OF CHARLESTOWN; ROBERT J. SCHIEDLER, CHARLES W. BECK, CHARLENE Q. DUNN, FORRESTER C. SAFFORD, and J. MICHAEL DOWNEY, in their capacity as Members of the Charlestown Town Council,

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Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF IN OPPOSITION

INTRODUCTION AND OVERVIEW

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq. It provided that any tribe which meets the definition of "Indian Tribe" and which owns land over which it possesses "governmental power" is entitled to the benefits of IGRA. The Narragansett Tribe concededly meets IGRA's eligibility requirements. Therefore it follows that it is entitled to the benefits of IGRA, which means essentially

that it can offer certain forms of gaming to the public and earn revenues therefrom, as hundreds of other tribes are doing under IGRA.

But Petitioners argued below that an earlier statute passed in 1978—the Rhode Island Claims Settlement Act (RIICSA), 25 U.S.C. §§ 1701 et seq.—excludes the Tribe from IGRA. Petitioners claimed that this argument is supported in a colloquy between three senators when IGRA was going through the Senate in 1988. However, nothing in IGRA itself supports that argument, and indeed, the Senate voted to remove a clause from the bill that *would* have excluded the Narragansetts.

Consequently, the United States District Court for Rhode Island, and the Court of Appeals for the First Circuit, both found that the face of IGRA took precedence over a floor colloquy. Petitioners ask this Court to accept the case for review and overrule the courts below. Aside from being a question of interest only in Rhode Island (and arguably in Maine and Massachusetts, which have somewhat similar settlement acts), this question is uniquely amenable to Congressional review. As the dissent below suggests, if Congress does not agree with the decisions of the courts below, it can always amend IGRA to restore the explicit language that the Senate deleted from IGRA.

That is precisely what the Rhode Island Senators (and Governor) urged Congress to do at a hearing on May 17, 1994, before the Senate Committee on Indian Affairs. However, the bill thereafter introduced by the Committee, S. 2230 (103d Congress), did not do as the Rhode Island delegation had urged. Instead, it was silent on the point, and the Committee Chairman, Senator Inouye (who had been one of the colloquists in 1988), urged that the State and Tribe try to work out their differences by agreement. On July 21, Governor Sundlun met with the Tribe, and announced to the press that he has agreed to talks "that will frame the terms under which the Tribe will build a

casino in Rhode Island." Providence Journal, July 22, 1994, front page.[1]

It thus seems that the question is not one of national importance that this Court should review. Petitioners have cited no important principle that needs declaration or modification, nor any disagreement among circuits. This case is sui generis. In any event, the question was correctly decided by the lower courts. And, we might add, there are strong indications that the question may soon be mooted by agreement between the Tribe and the Governor.

COUNTERSTATEMENT OF FACTS

We have no material quarrel with Petitioners' statement of facts (Pet. at 4-10), with one exception. Petitioners describe the circumstances of the agreement that led to section 1708 of the Rhode Island Indian Claims Settlement Act—the section that the Court of Appeals held gave the State concurrent jurisdiction over the settlement lands. Petitioners use these circumstances to argue that as of September 1988, Rhode Island's claimed jurisdiction over the settlement lands had been "agreed upon by the parties as a term of their settlement." Pet. at 8.

The Tribe agreed to no such thing. The State jurisdiction that the Tribe agreed to in the settlement was in the context of the Tribe's then-status as a non-recognized Indian tribe, with no sovereignty or jurisdiction of its own that was recognized by either Rhode Island or the United States. The Tribe *never* agreed that when and if it should ever become a recognized sovereign tribe with government powers of its own (as in fact happened in 1983), lands held by the Tribe would remain subject to State jurisdiction. Arguably section 1708 does not differentiate between the Tribe's pre-sovereign status and

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[1] Press reports out of Massachusetts indicate that Governor Weld and The Gay Head Wampanoag Tribe are near agreement on a casino to be located in New Bedford. This represents a switch in that State's position too.

its post-sovereign status, but if it applies to post-sovereign status at all, which the Tribe denies, it cannot be said that the Tribe *agreed* to it.

SUMMARY OF ARGUMENT

I. Petitioners argue that the Court of Appeals disregarded critical legislative history that controls the case. That is not so. The history in question is a colloquy between three Senators, which Petitioners would use to exclude the Narragansetts from an Act which on its face does not exclude them. Moreover, the original bill *had* a clause excluding the Tribe, but the Senate deleted it before the bill was passed.

Petitioners cite no conflict of courts, nor any principle at stake requiring declaration or modification by this Court.

II. Petitioners argue that the Court of Appeals disregarded canons of statutory construction when it held that portions of the RIICSA were impliedly repealed by IGRA, *citing Morton v. Mancari*, 417 U.S. 535 (1974), and *Watt v. Alaska*, 451 U.S. 259 (1981).

In *Morton* the question was whether the Equal Employment Opportunity Act of 1972, a general act prohibiting racial discrimination in federal employment repealed an earlier Act requiring BIA job preference for Indians. This Court said the two statutes were not in irreconcilable conflict, and therefore there was no implied repeal. Likewise in *Watt* the Court found two arguably inconsistent statutes not to be in fact inconsistent, so the later did not repeal the earlier.

The circumstances in both cases were complex and unique. They furnish no guidance here, and much less are they in any way inconsistent with the decision of the Court of Appeals. Nor have Petitioners cited any principle at stake requiring declaration or modification by this Court.

III. Petitioners attempt to implicate the Compact and Contract clauses of the Constitution. Those clauses have no relevance to this case nor were they raised below.

ARGUMENT

I. THE FIRST CIRCUIT PROPERLY APPLIED THIS COURT'S PRECEDENTS CONSTRUING LEGISLATIVE HISTORY IN DECIDING THAT THE NARRAGANSETT TRIBE IS NOT EXCLUDED FROM IGRA.

Congress enacted IGRA "to provide a statutory basis for the operation of gaming *by Indian tribes* as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1) (emphasis added).[2] It found the Act to be in furtherance of "a principal goal of Federal Indian policy . . . to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). The Act declares that "*Indian tribes* have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5) (emphasis added). Congress defined "Indian Tribe" to mean:

> "[*A*]*ny* Indian tribe, band, nation, or other organized group or community of Indians which—
>
> "(A) is recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States to Indians because of their status as Indians, and
>
> "(B) is recognized as possessing power of self-government."

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[2] This and other relevant sections of IGRA, which were not appended to the Petition, are set forth in Appendix A hereto.

25 U.S.C. § 2703(5) (emphasis added).[3] Under the unambiguous language of the Act, there is no special exclusion of the Narragansett Tribe or the State of Rhode Island from this sweeping federal Indian legislation.[4]

Petitioners urge that under this Court's precedents it is proper, indeed necessary, to reject this language, and to imply a specific exclusion of the Narragansett Tribe from the sweep of this legislation. They do not start with the textual language. Instead, they jump to an assertion that because section 1708 of the RIICSA existed at the time of IGRA's enactment and conflicts with IGRA's grant of jurisdiction over certain gaming activities to the Tribe, Congress could not have intended to displace it.

Petitioners' position might have merit if it were supported by the statutory text, *as it was in an earlier version of the bill that was to become IGRA*. A section of the bill, deleted before enactment, would have expressly excluded the Narragansetts from the Act:

> "23. Nothing in this Act may be construed as permitting gaming activities, except to the extent permitted under the laws of the State of Rhode Island, on lands acquired by the Narragansett Indian Tribe under the Rhode Island Indian Claims Settlement

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[3] As set forth in their definition of the "Questions Presented for Review," Petitioners do not seek review of the First Circuit's holding that the Narragansett Tribe falls within IGRA's definition of "Indian Tribe" or that it possesses "governmental power" over its land, which are the only other eligibility criteria. 25 U.S.C. § 2703(4). Their Petition is limited, instead, to the First Circuit's rejection of their arguments that Congress intended to exclude the Narragansett Tribe from the Act altogether.

[4] Consistent with the text, the Senate Committee Report for the bill that was to become IGRA states that the Act "is intended to expressly preempt the field in governance of gaming activities on Indian lands." S. Rep. No. 466, 100th Cong., 2d Sess. 6, *reprinted in* 1988 U.S.C.C.A.N. 3076. This and other relevant portions of the Senate Report, which were not appended to the Petition, are set forth in Appendix B hereto.

> Act or on any lands held by, or on behalf of, such Tribe."

134 Cong. Rec. S 12649 (daily ed. Sept. 15, 1988).[5] But the very deletion of that provision by vote of the Senate gives rise to a long-standing canon of construction, applicable to the text as enacted: when Congress deletes limiting language from a provision before enactment, it must be presumed that Congress intended the provision to operate without the limitations so deleted. *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *accord, United States v. Sisseton-Wahpeton Sioux*, 897 F.2d 358, 362 n.8 (8th Cir. 1990).

To ignore this presumption would engage the courts in dangerous speculations as to what deals are and are not struck in the game of politics that ultimately results in the language of a statute. It can hardly be said that the First Circuit's employment of that presumption works a misapplication of the precedents of this Court. Under that presumption the court examined the Narragansett exclusion which was deleted from the bill; the Senate report which accompanied the bill at a time when the deleted clause was still in the bill; and the related colloquy on the floor, and concluded that such legislative history could not change the express language ultimately enacted by Congress. *State of R.I. v. Narragansett Tribe*, 19 F.3d 685, 700 (1st Cir. 1994). Petition Appendix (Pet. App.) at 32. Far from being discordant with the decisions of this Court, it is in perfect harmony with them.

The Court of Appeals also rejected Petitioners' attempt to elevate the significance of the subject colloquy[6] in accordance with this Court's precedents, which "do not permit [the unambiguous text] to be expanded or con-

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[5] This portion and introductory portions of the Congressional Record, which were not appended to the Petition, are set forth in Appendix C hereto.

[6] Set forth in Petition Appendix at 102-03.

tracted by the statements of individual legislators or committees during the course of the enactment process." *West Virginia University Hospitals, Inc. v. Casey*, 111 S.Ct. 1138, 1147 (1991) (*citing United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *accord e.g., Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982) ("The contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history."). Such statements may provide evidence of legislative intent only when they are consistent with statutory language and other legislative history.[7] *See, e.g., Brock v. Pierce County*, 476 U.S. 253, 263 (1986); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984). That is not the case here.[8] Thus, the First Circuit properly gave

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[7] Otherwise, the court is left to inconclusive speculations. Indeed, it was believed at the time by some that Senator Pell was withdrawing his Narragansett exclusion clause because Congressman Udall, the Chairman of the House Interior Committee, had let it be known that a provision expressly singling out an Indian tribe for exclusion from general legislation benefiting Indian tribes would not be accepted in the House. This seems much more plausible than that the withdrawal was "in the interests of clarity" as the colloquy suggested. The First Circuit properly characterized the colloquy as anything but clarifying and provided its own plausible explanation for the withdrawal of the Narragansett exclusion. *See* 19 F.3d at 698 n.14; 700 n.16.

[8] Indeed, other pieces of legislative history run contrary to the congressional intent lobbied by Petitioners. The Senate Committee Report states that IGRA *"is intended to expressly preempt the field in the governance of gaming activities on Indian lands."* S. Rep. No. 446, 100th Cong., 2d Sess. 6, *reprinted in* 1988 U.S.C.C.A.N. 3076 (emphasis added). It also provides that "[t]he Committee . . . trusts that courts will interpret any ambiguities on these issues in a manner that will be *most favorable to tribal interests* consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes." *Id.* at 15. The first statement is perfectly consistent with the sweeping language of the text of the Act: IGRA covers the field of Indian gaming pursuant to Congress's plenary power over such matters. The second is consistent with federal common law, and nothing in the text of the Act

precedence to the text of the IGRA over the colloquy of three Senators without departure from the applicable decisions of this Court.

The same is true of its treatment of selected language from the Senate Committee report relied upon by Petitioners.[9] As the District Court concluded and the First Circuit affirmed, "[P]etitioners are asking this court to interpret the Senate report as carrying the force of law where there is no textual support for their position." *State of Rhode Island v. Narragansett Tribe*, 816 F. Supp. 796, 803 (D.R.I. 1993), *aff'd*, 19 F.3d at 700. The timing of that language in relation to the deletion of Rhode Island's special exemption from the Act renders it valueless as evidence of congressional intent:

> "The Senate report speaks only to the bill *as reported out of committee*; it was composed *before* the deletion of the Special Rhode Island exemption provision,

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suggests that Congress expected it to be construed in derogation of that standard.

Also, the Senate Committee Report for IGRA provided:

> "There are five States (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that criminally prohibit any type of gaming, including bingo. S. 555 bars any tribe within those States, as a matter of Federal law, from operating bingo or any other type of gaming. *In the other 45 States, some forms of bingo are permitted and tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to the regulatory scheme set forth in the bill.*"

Id. at 11-12 (emphasis added). Pet. App. at 99-100. This is consistent with the First Circuit's view that exclusive regulation of class I and II gaming passed to the Narragansett Tribe under IGRA. Non-exclusive regulation of class III gaming, fairly consistent with the RIICSA, became governed by the dual tribal-state regulation under IGRA. *See also* App. B, setting forth other relevant and consistent legislative history.

[9] Set forth in Pet. App. at 100-01.

> former section 23, from the final version of the bill during floor debate. Thus, the quoted statement sheds no light on Congress's intent regarding the law it actually enacted."

State of R.I. v. Narragansett Tribe, 19 F.3d at 700 (emphasis original). Pet. App. at 32. Again, this logic is in no sense a departure from the precedents of this Court.

II. THE FIRST CIRCUIT DID NOT MISAPPLY CANONS OF STATUTORY CONSTRUCTION PERTAINING TO "REPEALS BY IMPLICATION."

> "[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. See, *e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 . . . (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103 . . . (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 . . . (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981); see also *Ron Pair Enterprises, supra*, 489 U.S., at 241, 109 S.Ct. at 1030."

Connecticut Nat. Bank v. Germain, 112 S.Ct. 1146, 1149 (1992). Furthermore, "the State fails to appreciate . . . that the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). "[T]he canons of construction applicable in Indian law are deeply rooted in the unique trust relationship between the United States and the Indians." *Id.* (quotations and citations omitted). One cardinal principle is that "statutes are to be construed liberally in favor of the Indians." *Id.* (citations omitted). *Accord, County of*

Yakima v. Yakima Indian Nation, 112 S.Ct. 683, 693 (1992) (describing this as "a principle deeply rooted in this Court's Indian jurisprudence").

The First Circuit, emphasizing the importance of the statutory text, faithfully abided by the decisions of this Court in applying traditional canons of statutory construction. But even if it strayed from those standard rules of thumb, as the lone dissenter on that Court suggested, its decision is fully compatible with the canons of construction applied in the Indian law context.

Having concluded that IGRA applied to the Narragansett Tribe, the First Circuit confronted the conflict between that applicability and section 1708 of RIICSA, which it held gave Rhode Island non-exclusive civil regulatory jurisdiction over the Tribe's land. *Id.* at 696, 702. Petitioners seize upon this conflict, attempting to turn the doctrine that "implied repeals are disfavored" to their favor: they ask that Congress's failure to explicitly exclude the Narragansetts be ignored and that the Tribe be excluded from IGRA under what amounts to the reverse of the same implied repeal doctrine that the court held favored the Narragansetts. They exclaim that the First Circuit "failed to comply with this Court's repeated holdings regarding repeals by implication." Petitioners are wrong.

It is not enough for Petitioners to assign error to the Court of Appeals by citing the litany of cases stating the obvious: that "repeals by implication are not favored." *See* Petition at 15-20 (citing, e.g., *Morton v. Mancari,* 417 U.S. 535 (1974); *Watt v. Alaska,* 451 U.S. 259 (1981); *St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772 (1981)). That rule has other inseverable facets that come into play in this case.

First, where feasible, courts will strive to give effect to both arguably conflicting statutes so as to preserve the sense and purpose of both. *See Watt v. Alaska,* 451 U.S.

at 267 (citing *Morton v. Mancari*, 417 U.S. at 551; *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940)). Second, when earlier and later statutes are irreconcilable, courts may have no choice but to find that one repeals the other by implication. *See Morton v. Mancari*, 417 U.S. at 550 (*citing Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945)); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871); *Natural Resources Defense Council v. U.S.E.P.A.*, 824 F.2d 1258, 1278-79 (1st Cir. 1987). Third, "if the two [acts] are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *Tynen*, 78 U.S. (11 Wall.) at 92. *See also* 2B Norman J. Singer, *Sutherland on Stat. Const.* § 51.02 (5th ed. 1992) (more recent of two irreconcilable statutes governs). Finally, in all of this, the "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766. The First Circuit did not depart from these standards.

Petitioners have to concede that the Court of Appeals correctly found an irreconcilable conflict between section 1708 of RIICSA, which the court held gave Rhode Island jurisdiction over all Narragansett activity, including gaming, and IGRA's sweeping governance of all Indian gaming. But Petitioners suggest that the *earlier* in time must be the "winner" and the later the "loser" under their application of the rules surrounding "implied repeals." As the First Circuit correctly decided, however, the legislative history on which Petitioners bank is inconsistent with the face of IGRA (which declares that tribes who meet the eligibility criteria, as the Narragansetts do, are entitled to the benefits of the Act) and inconclusive on its own.

We note too that the Tribe's eligibility for IGRA, which displaces only a small part of Rhode Island's concurrent jurisdiction over the Tribe's land, would not thwart section 1708 of RIICSA nearly as much as elimination of

the Tribe entirely from IGRA would thwart Congress's purpose to have IGRA govern the entire field of Indian gaming (sections 2701-2702 of IGRA). *See State of R.I. v. Narragansett Tribe,* 19 F.3d at 704-05. Pet. App. at 42-43.

It is instructive that one of the leading cases for this Court's articulation of the canons surrounding "implied repeals" is an Indian case, *Morton v. Mancari,* 417 U.S. 535 (1974).

In *Mancari,* this Court rejected arguments that the enactment of Title VII's prohibition against race discrimination in federal employment caused a repeal of federal "Indian hiring preferences" within the Bureau of Indian Affairs. Those preferences, the Court pointed out, were part of longstanding federal policies to strengthen tribal self-goverment, both politically and economically. *Id.* at 542-43. The Court went on to describe such preferences as part of Congress's constitutional duty to legislate on behalf of the Indian tribes—"to do all that is required to . . . prepare the Indians to take their place as independent, qualified members of the modern body politic." *Id.* at 552 (citations and quotations omitted).

These very considerations support deference to Congress's intent to preempt the field of Indian gaming through IGRA in furtherance of its long-standing trust duty to promote tribal self-sufficiency and economic development. To ignore that express intent and to imply, without textual support or qualified legislative history, an exclusion for the Narragansetts, would place the Court in interference with Congress's purpose to enact broad legislation for the benefit of all tribes.

In short, the primary lesson to be drawn from *Mancari* for this case is that courts must be extremely leery of thwarting the clear expressions of Congress in the field of federal Indian policy. The First Circuit's decision is consistent with that teaching. Petitioners extrapolate

from the mere fact of this Court's rejection of an implied repeal in *Mancari* and other cases, that it must do the same here. *See* Petition at 15-18. This is a narrow, simplistic, and unworkable view of the case law.[10]

With due respect to the dissenting opinion in the Court of Appeals, *Watt v. Alaska*, 451 U.S. 259 (1981), which on the circumstances present in *Watt* applied the rules set forth in *Mancari*, does not command a different result. The arguably conflicting provisions at issue in *Watt* were found not to be truly in conflict. Hence, the usual rule was followed that where there is no irreconcilable conflict, there is no implied repeal. Whether two statutes are in conflict usually depends on a variety of surrounding circumstances. It is simply not credible to say that the circumstances present in *Watt* give any useful guidance whatever in our case as to whether RIICSA and IGRA are in conflict.

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[10] In *Mancari*, for instance, the Court considered numerous factors indicating Congress's obvious intent to retain the former statute. Congress had exempted from Title VII the "Indian hiring preferences" for tribal and reservation-related private employers. The Court refused to attribute to Congress the "irrationality and arbitrariness" of a repeal by implication of similar preferences for BIA employment simply because it did not include a specific exemption in that regard upon expanding Title VII to the federal government. 417 U.S. at 548. It also pointed out that it was "improbable, to say the least" that within 3 months of the subject expansion of Title VII, Congress would expand "Indian hiring preferences" in other federal programs if its intent in the former was to repeal those within the BIA. *Id.* at 548-49. It is these factors that made *Mancari* "a prototypical case where an adjudication of repeal by implication [was] not appropriate." *Id.* at 550. It was obvious that Title VII was "designed to deal with an entirely different and, indeed opposite problem" than the BIA hiring preferences. *Id.* "Any perceived conflict is thus more apparent than real." *Id.* There are no similar factors involved in this case. The conflict is narrow, but real and the resolution most consistent with the expression of congressional intent is preservation of IGRA as an Act that governs the field.

III. THERE ARE NO RELEVANT CONSTITUTIONAL QUESTIONS RAISED BY PETITIONERS.

In a last ditch effort to persuade this Court that the First Circuit misapplied applicable precedent, Petitioners make the novel argument—not raised to the courts below—that there may be "Compact Clause" dimensions to their problem.[11] They conveniently rely upon *St. Martin v. Evangelical Lutheran Church*, 451 U.S. 772 (1981) to suggest that this must change to their advantage the formula for application of rules surrounding implied repeals. *See* Petition at 20-23.

The Compact Clause is irrelevant on its face. It refers to compacts by States with other States or with foreign powers. An Indian tribe is neither. The Constitution reserves to Congress full plenary authority over matters affecting the Tribes. U.S. Const. Art. I, § 8, cl. 3. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."). The status of the tribes in relation to the states and the federal government is unique; it cannot be construed similarly to that of foreign nations. *See, e.g., Worcester v. Georgia*, 31 U.S. 313, 323-24 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 25, 31 (1831). The "Compact Clause" has no application here.

Petitioners apparently argue that section 1708 of RIICSA must be treated the same as a debt or obligation of the United States of America and, from there, suggest

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[11] Petitioners cite to "U.S. Const. Art. I, § 10, cl. 8." Petitioners' Brief at 21. There is no eighth clause to Article I, section 10. Presumably, Petitioners meant to cite clause 3, which provides:

> "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless invaded, or in such imminent Danger as will not admit of delay."

that application of IGRA to the Narragansett Tribe would be a breach of that obligation, prohibited by the "Contract Clause." Petition at 20-23.

If that is their argument, it too fails. First, section 1708's grant of non-exclusive jurisdiction to Rhode Island over the Tribe's land is not an enforceable contract. *See National Railroad Passenger Corporation v. Atchinson, T. & S. F. R. Co.*, 470 U.S. 451, 465-70 (1985) (presumption is that legislation declares a policy and does not create vested rights "absent some clear indication that the legislature intends to bind itself contractually"). The cases relied upon by Petitioners involved explicit debts or obligations of the United States. *See Perry v. United States*, 294 U.S. 330 (1935) (bond issued on credit of United States; Constitution gives Congress power to so borrow, but not to repudiate the obligation); *Lynch v. United States*, 292 U.S. 571 (1934) (life insurance obligation under War Risk Insurance Act of 1917 with monthly premiums paid by insured).

Application of IGRA to the Narragansett Tribe in partial repeal of section 1708 is not analogous to the repudiation of government obligations. There have been no "fruits actually reduced to possession of contracts lawfuly made"; if RIICSA allocates concurrent jurisdiction to the State in section 1708, that "constitutes neither a debt of the United States, nor an obligation of the United States to provide benefits under a contract for which the obligee paid a premium." *See Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986) (distinguishing cases finding United States in breach of contractual obligations) (citations omitted).[12]

---

[12] We take issue with Petitioners' assertion of these arguments on both procedural and factual grounds. If Petitioners are to lay blame against the United States in this manner, they should be obliged to name it or the appropriate officers as parties to this action. We also deny Petitioners' assertion that section 1708 is tantamount to a bargained-for contract, see Counterstatement of Facts, pp. 3-4 above.

More importantly, Petitioners' speculative "constitutional questions" have no place in this case. Congress's plenary power over Indian matters is, itself, established by the Constitution. *See* U.S. Const. Art. I, § 8, cl. 3. As stated in *Mancari*, this gives rise to a "special relationship":

> "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic."

417 U.S. at 552 (quotations and citations omitted). Congress enacted IGRA in "proper fulfillment of its trust" to all tribes. The exclusion of the Tribe by implication from a Congressionally authorized source of revenue would jeopardize that trust. *See id.* at 552-53.

Indeed, Petitioners ignore the principle that there is a presumption against implying into the construction of section 1708 a limitation upon this plenary power of Congress. *See Joplin v. Southwest Missouri Light Co.*, 191 U.S. 150, 157 (1903) (presumption against contracting away governmental powers). Congress certainly remains free to modify prior legislative schemes under the fundamental rule that one Congress may not bind a subsequent Congress. *See Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932); *Connecticut Mutual Life Insurance Co. v. Spratley*, 172 U.S. 602, 621 (1899); *Sierra Club v. Froehlke*, 816 F.2d 205, 215 (5th Cir. 1987).[13] And

[13] This holds true even if section 1708's grant of nonexclusive jurisdiction to Rhode Island were construed as some sort of contractual arrangement. *See Merrion v. Jicarilla Apache Tribe*, 455

this rule has particular force in the realm of legislation pertaining to the tribes. In exercising its plenary authority in this area, Congress may act through general legislation or through legislation specific to a particular tribe to regulate tribal activities previously subject to state authority. *See, e.g., Montana v. Blackfeet Tribe of Indians* 471 U.S. at 765-67; *United States v. John*, 437 U.S. 634, 649-53 (1978); *Brader v. James*, 246 U.S. 88, 95-97 (1918); *Tiger v. Western Investment Co.*, 221 U.S. 286, 310-17 (1911); *United States v. Wright*, 53 F.2d 300, 305-08 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932).

In sum, there is no merit to Petitioners' attempt to insert constitutional concerns into the application of canons pertaining to "implied repeals." The First Circuit's decision is in keeping with the decisions of this Court.

CONCLUSION

The decision of the United States Court of Appeal for the First Circuit is fully consistent with the decisions of this Court and presents no important, undecided question of federal law. The Petition for Certiorari should be denied.

Respectfully submitted,

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August 10, 1994

U.S. 130, 147-48 (1982) (*citing Veix v. Sixth Ward Building & Loan Assn. of Newark*, 310 U.S. 32 (1940); *Home Building & Loan Assn. v. Blaisdell*, 209 U.S. 398 (1934)).

APPENDIX A

UNITED STATES CODE
TITLE 25-INDIANS, CHAPTER 29—
INDIAN GAMING REGULATION

* * *

§ 2701. Congressional Findings

The Congress finds that—

* * *

(4) A principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian land if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

§ 2702. Congressional Declaration of Policy

The purpose of this chapter is—

(1) To provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government;

* * *

(3) To declare that the establishment of independent, Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards, for gaming on Indian lands, and the establishment of a National Indian Gaming Commission, are necessary to meet Congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

§ 2703. Definitions

For purposes of this chapter—

* * *

(5) The term "Indian Tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

* * *

APPENDIX B

SENATE REPORT NO. 100-446

* * *

STATEMENT OF POLICY

* * *

In determining what patterns of jurisdiction and regulations should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong, Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands. [p. 5]

* * *

S. 555 is intended to expressly preempt the field of the governance of gaming activities on Indian lands. Consequently, Federal Courts should not balance competing Federal, State and Tribal interests to determine the extent to which various gaming activities are allowed. [p. 6]

* * *

Burden of Proof.—Section 11(d)(7) grants a Tribe the right to sue a State if compact negotiations are not concluded. . . .

The Committee notes that it is States not tribes, that have crucial information in their possession that will prove or disprove tribal allegations of failure to act in good faith. . . . The Committee recognizes that this may include issues of a very general nature and, of course, trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by Courts for over 150 years in deciding cases involving Indian Tribes. [pp. 14-15]

APPENDIX C

CONGRESSIONAL RECORD—SENATE

September 15, 1988 S 12643-49

REGULATING OF GAMING ON INDIAN LANDS

* * *

The assistant legislative clerk read as follows:

A bill (S. 555) to regulate gaming on Indian lands.

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Select Committee on Indian Affairs with an amendment to strike all after the enacting clause and insert in lieu thereof, the following:

* * *

NARRAGANSETT INDIAN TRIBE

SEC. 23. Nothing in this Act may be construed as permitting gaming activities, except to the extent permitted under the laws of the State of Rhode Island, on lands acquired by the Narragansett Indian Tribe under the Rhode Island Indian Claims Settlement Act or on any lands held by, or on behalf of, such Tribe.

* * *

Supreme Court, U.S.
FILED
AUG 10 1994
OFFICE OF THE CLERK

(3)

No. 94-68

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, ET AL.,
Petitioners,

v.

NARRAGANSETT INDIAN TRIBE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF MASSACHUSETTS AND THE STATES OF ALABAMA, ALASKA, ARIZONA, CALIFORNIA, CONNECTICUT, FLORIDA, MAINE, NEVADA AND SOUTH CAROLINA IN SUPPORT OF PETITIONERS

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Questions Presented

1. Should the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2710-2721 and 18 U.S.C. §§1166-1168 ("IGRA") be construed in harmony with the claims settlement acts approved by Congress?

2. Does the First Circuit's ruling that IGRA impliedly repeals portions of the Rhode Island Indian Claims Settlement Act ("RICSA") unnecessarily raise issues under the Fifth and Tenth Amendments to the United States Constitution, which could be avoided by a proper construction of the statutes in question?

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Tribe, *American Constitutional Law*, (2d ed. 1988) 14

Statement of Interest of Amici Curiae

The *amici curiae* Commonwealth of Massachusetts and the States identified on the cover of this brief are sovereign States who have federally recognized Indian tribes within their borders. The *amici* have received requests from these tribes to negotiate regarding proposed gambling operations on tribal lands. They are deeply interested in this case, because the Court of Appeals' opinion jeopardizes statutory and constitutional rights of the States. Even more ominously, the Court of Appeals' ruling that IGRA impliedly repealed a material portion of a negotiated agreement between Rhode Island and the Narragansetts, enacted into federal law, calls into question whether States may ever rely upon their voluntary resolution of disputes with tribes, even after Congress ratifies their settlement agreement. If left undisturbed, the ruling below warns States that a carefully negotiated agreement with a tribe, approved by a federal statute, may be subject to unilateral repeal by implication by Congress at a later date, after the State has already given the bargained-for consideration to the tribe.

The issue extends well beyond Rhode Island and affects any State that has or may in the future wish to enter into federally approved compacts with tribes. Congress has already approved settlements between some of the *amici* and the tribes within their respective borders. For instance, in 1987, Congress approved the Massachusetts Indian Land Claims Settlement between the Commonwealth and the Wampanoag Tribal Council of Gay Head, Inc. 25 U.S.C. § 1771 *et seq.*, Pub. L. 100-95, 101 Stat. 704 (Aug. 18, 1987). The settlement, as

enacted by Congress, reserved the Commonwealth's jurisdiction to apply its law to tribal lands and members and denied the Tribe any such jurisdiction.[1] The Massachusetts settlement act expressly makes applicable to tribal land those "laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance." 25 U.S.C. § 1771g.[2] Similarly,

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[1] The relevant statutes read:

> Except as otherwise expressly provided in this subchapter, or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, *shall be subject to the civil and criminal laws*, ordinances and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (*including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance*). 25 U.S.C. § 1771g (emphasis added).

> The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and *shall not exercise any jurisdiction over any part of the settlement lands in contravention of* this subchapter, *the civil regulatory and criminal laws of the Commonwealth of Massachusetts*, the town of Gay Head, Massachusetts, and applicable Federal laws. 25 U.S.C. § 1771e(a) (emphasis added).

[2] While the arguments in this brief suffice to demonstrate that the Massachusetts settlement act is not impliedly repealed by

the Maine Indian Claims Settlement Act was enacted in 1980, governing the relations between Maine and the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians. 25 U.S.C. §1721 *et seq.*, Pub. L. 96-420, §4, 94 Stat. 1787 (Oct. 10, 1980). With some non-applicable exceptions (generally relating to certain child welfare, land transfer, condemnation and taxation matters), the Act provides that tribes within Maine shall be subject to Maine's civil and criminal jurisdiction and laws.[3] The Maine settlement act also

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IGRA, the language of the Massachusetts Act provides additional grounds leading to that result. Not only does it expressly recognize the Commonwealth's regulatory power over "the conduct of bingo or any other game of chance," but as the First Circuit noted, 19 F.3d at 702, it also expressly limits tribal jurisdiction. 25 U.S.C. §§1771e(a), 1771g.

[3] The relevant statute provides that the Houlton Band of Maliseet Indians, among others, "shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein." 25 U.S.C. § 1725(a). With respect to the two other tribes recognized and involved in the settlement, the Act provides:

> The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified and confirmed.

25 U.S.C. § 1727(b)(1).

The Maine Implementing Act (30 M.R.S.A. §§ 6201 *et seq.*)

provides that "no law or regulation of the United States" shall affect Maine's civil, criminal or regulatory jurisdiction and that any future federal law that "would affect or preempt the application of the laws of the State of Maine" will not apply "unless such provision . . . is specifically made applicable within the State of Maine." 25 U.S.C. §§ 1725(h), 1735(b).[4]

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provides:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 M.R.S.A. § 6204. The Maine Implementing Act further provides that, with the exception of certain misdemeanors and juvenile crimes involving exclusively members of the Passamaquoddy Tribe or Penobscot Nation, "all laws of the State relating to criminal offenses and juvenile crimes shall apply within the Passamaquoddy and Penobscot Indian reservations and the State shall have exclusive jurisdiction over those offenses and crimes." 30 M.R.S.A. § 6209(1).

[4] While Maine agrees with the arguments in this brief, Maine further points out that the unique "specifically made applicable" language in the Maine settlement act (25 U.S.C. § 1735(b)) is another reason why a generic piece of legislation like IGRA, which does not mention Maine and has never otherwise been specifically made applicable within Maine, does not apply in Maine. Moreover, the Maine settlement act's "specifically made applicable" language demonstrates Congress' awareness in 1980

Like the Rhode Island settlement involved in this case, the Maine and Massachusetts settlements were negotiated and concluded between each State and tribe on a sovereign-to-sovereign basis.[5] The settlements resolved contested litigation and involved concessions by the States, in the form of consideration to the tribes. See, e.g. 1985 Mass. St. c. 277, § 3 (As part of the settlement, Massachusetts authorized its subdivision, the Town of Gay Head, to convey town lands to the Tribe.); *Penobscot Nation v. Stilphen*, 461 A.2d 478, 488 n.7 (Me.), app. dism., 464 U.S. 923 (1983)(acknowledgment by Tribe's counsel of the *quid pro quos* in the negotiation process). See also 25 U.S.C. § 1772(4)(consideration to be

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that there would be subsequent legislation affecting Indian tribes generally throughout the country (like IGRA) and that such legislation would not affect or preempt Maine law unless specifically made applicable in Maine. That is, Maine's "specifically made applicable" language is a deliberate bar to implied repeals of Maine's settlement act by future generic Congressional Indian legislation. Such repeals, to have effect, must be explicit. There is nothing in IGRA that explicitly repeals Maine's settlement act.

[5] Other settlement acts include the Seminole Indian Land Claims Settlement Act of 1987, 25 U.S.C. § 1772d(d)(1)(Florida laws concerning, among other things, gambling apply to settlement lands) and the Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. § 1747(b)(2)(A)(same as to settlement act lands of Miccosukee Tribe). See also Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, 25 U.S.C. §§ 941*l*(a), 941m (post-IGRA settlement act providing that IGRA shall not apply to the tribe and that no future federal law will apply to the tribe unless the law is specifically made applicable within the State of South Carolina).

provided by Florida to the Seminole Tribe); 25 U.S.C. § 1743(same as to Miccosukee Tribe); 25 U.S.C. § 1771c(a)(1)(A); 25 U.S.C. § 941(a)(7)(benefits accruing to the Catawba Tribe and to South Carolina).

Read broadly, the decision of the Court of Appeals in this case is likely to engender litigation over States' authority to exercise jurisdiction over gambling activities that may have serious impacts upon the States' residents and environment. See also *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498, 1503-04 (S.D. Cal. 1992)(holding that IGRA preempts 18 U.S.C. § 1162 (Pub. L. 280)). The *amici* States have outlawed or severely restricted casino gambling, because of the potential for commission or promotion of criminal activity. See, e.g., Mass. Gen. Laws, c. 271, §§ 1, *et seq.*; 17 M.R.S.A. § 332(3),(4); Cal. Pen. Code §§ 330, 330(a), 330.1. In addition, casinos in at least some of those States would likely have serious traffic and environmental effects, which would ordinarily be subject to state and local regulation. The *amici* submit this brief in support of the State of Rhode Island and Providence Plantations, because the Court of Appeals' rationale and holding are inconsistent with federal statutory and constitutional law.

Statement

The *amici* adopt Rhode Island's statement of the case.

Argument

The *amici* support the arguments made by Rhode Island in this case. This brief supplements Rhode Island's petition by concentrating on two aspects of this case that have great significance not only for existing settlement act States, but for any State that contemplates resolving matters of state and tribal jurisdiction voluntarily, with Congressional approval. First, while there is strong legislative history to support Rhode Island's position, the *amici*'s argument does not rise or fall upon legislative history, but follows entirely from the text and structure of IGRA and RICSA. Under the rules of statutory construction that must govern inter-sovereign agreements, the texts of IGRA and of state settlement acts like RICSA are consistent. Accordingly, IGRA did not implicitly repeal the confirmation of state jurisdiction in Indian settlement acts passed by Congress. Second, the Court of Appeals' opinion violates the general rule that statutes should be construed to avoid constitutional questions—in this case, questions arising under the Fifth and Tenth Amendments to the United States Constitution.

I. By Its Terms, IGRA Did Not Repeal Specific Settlement Agreements That Preserved State Jurisdiction.

The RICSA, like other tribal-state claims settlement acts, can be read consistently with IGRA. Under RICSA, the State of Rhode Island has bargained for and obtained tribal and federal statutory approval of state "civil regulatory jurisdiction, as well as civil adjudicatory jurisdiction . . ." over the lands in question. 19 F.3d at 696. By extending to laws that regulate

gambling, RICSA and other settlement acts expressly reject the frequently-made distinction in Indian gaming cases between regulatory laws and prohibitory laws. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Under RICSA, *both* types of state laws apply to gaming on Narragansett lands. Since the lands are expressly "subject to" this state jurisdiction (25 U.S.C. § 1708), the Tribe acknowledged and accepted its lack of jurisdiction, pursuant to RICSA, over activity that is unlawful under Rhode Island law. See also 25 U.S.C. § 1771e(a) (Massachusetts Claims Settlement Act excludes Wampanoag jurisdiction); 25 U.S.C. § 1725(b)(1),(f); 30 M.R.S.A. § 6204; *Penobscot Nation*, 461 A.2d at 478, 488 (Maine Claims Settlement Act excludes tribal jurisdiction).[6] The question is whether IGRA somehow created (or restored) tribal jurisdiction for the Narragansetts to engage in gambling on lands that are "subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708.

Contrary to the Court of Appeals' assumption, IGRA does not create any new tribal jurisdiction, but speaks only to the

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[6] While the First Circuit correctly noted that the Maine and Massachusetts settlement acts contain express "limits on Indian jurisdiction," 19 F.3d at 702, it failed to recognize that RICSA necessarily limited the Narragansetts' jurisdiction in the relevant sense under IGRA by making tribal land "subject to" Rhode Island law. In any event, even if RICSA contains fewer limits upon tribal jurisdiction than some other settlement acts, the more generally applicable and significant point remains that IGRA and RICSA can be reconciled without impliedly repealing Rhode Island's jurisdiction over gaming on Narragansett lands, as shown below.

rights of tribes that already have the requisite jurisdiction over tribal lands. In particular, IGRA does not contain any language expressly repealing prior, specific legislation allocating jurisdiction over tribal lands between States and tribes. Congress must have been aware of these pre-existing statutory limitations upon the jurisdiction of some tribes when it enacted IGRA.[7] See *Miles v. Apex Marine Corp*, 498 U.S. 19, 32 (1990). Not surprisingly, IGRA expressly recognizes such limitations:

> Class III gaming activities shall be lawful on Indian lands only if such activities are—
>
> (A) authorized by an ordinance or resolution that—
>
> (i) is adopted by the governing body of the Indian tribe *having jurisdiction over such lands*
>
> . . .

25 U.S.C. § 2710 (d)(1)(A)(emphasis added). Similarly, the ability to request negotiations over a tribal-state compact regarding class III gaming is limited to tribes "having jurisdiction:"

> Any Indian *tribe having jurisdiction over the Indian lands* upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into

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[7] Evidence of Congress' awareness, as well as its willingness to speak expressly to the issue of at least some prior statutes subjecting tribes to state jurisdiction, appears in the Indian Child Welfare Act of 1978. 25 U.S.C. § 1918(a).

> a Tribal-State compact governing the conduct of gaming activities.

25 U.S.C. § 2710(d)(3)(A)(emphasis added). Thus, not all tribes have authority under IGRA to request negotiations for a tribal-state gaming contract or to authorize class III gaming. Only those tribes "having jurisdiction over such lands" have that authority. By straightforward negative implication, the statute contemplates that some tribes will not have the requisite jurisdiction over tribal lands.[8] And, indeed, under RICSA, the Tribe within Rhode Island does not. By the express terms of IGRA, then, no class III gaming could be authorized by the tribe, since the Tribe lacks the requisite "jurisdiction over such lands." 25 U.S.C. § 2710(d)(1)(A).

Against this plain language in IGRA, the decision below works a distortion of the text, the prevailing rules of statutory contruction and federalism. The Court of Appeals' holding depends upon its conclusion "that the Settlement Act and the Gaming Act are partially but not wholly repugnant." 19 F.3d at 704. In the Court's view, Rhode Island's bargained-for sovereignty, making the settlement lands "subject to" its civil regulatory jurisdiction, was inconsistent with IGRA to the extent that the State claimed "jurisdiction touching on gaming." *Id.* But there is a way to read the text of both Acts that avoids all repugnancy. It is entirely consistent with IGRA to read RICSA as providing that the Naragansett Tribe is one of those

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[8] If necessary to avoid a statutory conflict, IGRA's reference to "jurisdiction" could and should be read to refer to jurisdiction only in the relevant sense, that is, civil regulatory jurisdiction over gambling. It is precisely that jurisdiction that RICSA places in the State.

tribes that lack the requisite jurisdiction that would trigger IGRA's mandatory negotiation provisions.

This construction avoids any need to resort to the disfavored repeal-by-implication doctrine and therefore must be adopted, under the fundamental principle that statutes should be read consistently with each other, if possible. See, e.g. *Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986); *United States v. Burns*, 725 F.Supp. 116 (N.D.N.Y. 1989), *aff'd sub nom. United States v. Cook*, 922 F.2d 1026 (2d Cir.), *cert. denied sub nom. Tarbell v. United States*, 500 U.S. 941 (1991)(IGRA does not implicitly repeal 18 U.S.C. § 1955, prohibiting operation of slot machines). Congressional approval of the Massachusetts settlement predated IGRA by only fourteen months, and Florida's Seminole settlement was less than a year old when IGRA passed. It would be highly unusual if statutes passed within barely a year of each other were so inconsistent that they cannot both stand. The reference to "jurisdiction" in IGRA thus must be interpreted in harmony with language of settlement acts. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). To rule otherwise would violate the rule that effect must be given "to every clause and word of [the] statute" conferring jurisdiction on the States. See *Negonsott v. Samuels*, 113 S.Ct. 1119, 1123 (1993)(citation omitted).

The *amici*'s construction also obviates the need to conclude that Congress implicitly restricted state jurisdiction—an action that ordinarily would require a clear statement in the statute. This Court has recognized the need for a clear textual statement in federal legislation when Congress abrogates or diminishes traditional state authority in many contexts. See *Department*

of Revenue of Oregon v. *ACF Industries, Inc.*, 114 S.Ct. 843, 850 (1994)("Principles of federalism" require Congress to speak clearly if it intended to "set limits upon the taxation authority of state government, an authority [the Supreme Court has] recognized as central to state sovereignty."); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991)(a clear statement is necessary before broad preemption of state law will be inferred under the Supremacy Clause)[9]; *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989)(a "clear statement" to abrogate Eleventh Amendment immunity must appear in the language of the federal statute itself). It would violate these principles to conclude that Congress impliedly repealed state authority to regulate gambling under the settlement acts.

In this case, Congress first expressly preserved state jurisdiction in RICSA and then provided for IGRA negotiations only where tribes have jurisdiction. To read the statutes as the Court of Appeals did therefore creates a new and dangerous mechanism for the unintended—or at least unstated—restriction

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[9] While clear statement principles governing preemption of state law may not generally "apply to federal enactments regulating Indian tribes," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980), the present situation is not the ordinary one. Where a state settlement act confirms state regulatory authority over tribal lands and members, the question is not one of the "unique historical origins of tribal sovereignty," *id.*, because the settlement acts extinguish the aboriginal rights and similar claims of the tribes and their members. See e.g. 25 U.S.C. § 1705(a)(2),(3); 25 U.S.C. § 1723(3)(b),(c); 25 U.S.C. § 1744(b); 25 U.S.C. § 1772c(b); 25 U.S.C. § 1771b(b),(c). Rather, the question is one of abrogation of settled state authority in the absence of historical claims. In such situations, clear statement analysis and rationales apply with full force.

of state jurisdiction through the federal legislative process. Such a rule could adversely affect virtually every State in the Union and therefore should be the subject of review by this Court.

II. IN ORDER TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS, IGRA MUST BE READ TO EXEMPT RHODE ISLAND AND OTHER SETTLEMENT ACT STATES FROM MANDATORY GOOD FAITH NEGOTIATIONS OVER INDIAN GAMING.

The Court of Appeals' construction of RICSA and IGRA led it to the erroneous conclusions that the two statutes are "partially . . . repugnant" and that Rhode Island's bargained-for regulatory jurisdiction over gaming must be abrogated. Even if such an approach were consistent with usual rules of statutory construction, it would violate the principle that statutes must be construed to avoid constitutional questions. See, e.g., *New York v. United States*, 112 S.Ct. 2408, 2425 (1992). Only a holding that Rhode Island is under no statutory obligation to negotiate would avoid the necessity for a decision—in this case or subsequent cases[10]—whether IGRA is constitutionally infirm under the Fifth and Tenth Amendments

As construed by the Court of Appeals, IGRA has divested

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[10] While Rhode Island did not raise the 5th and 10th Amendment issues below, the statutory construction question involved here cannot be decided without considering the constitutional provisions protecting the States from certain federal legislation. Moreover, the constitutional questions are likely to arise in subsequent cases, possibly involving the *amici*.

the State of jurisdiction that was negotiated, agreed to and confirmed as a means of resolving litigation in an agreement between Rhode Island and the Narragansetts on a sovereign-to-sovereign basis. If IGRA truly overrides state jurisdiction, then Congress has asserted a power to prejudice the rights of the States retroactively by altering unilaterally the terms of a settlement agreement despite previous Congressional approval of the agreement, and despite the careful negotiations between the sovereign States and the sovereign tribes. It has asserted this power notwithstanding the provision of consideration for the agreement by the States (see above, pp. 5-6). Any suggestion that Congress may do so must take account not only of the States' sovereignty, embodied in the constitutional scheme, but also of the general constitutional principles limiting the federal government's ability to impair agreements.

For instance, Congress may not repudiate agreements that it makes with private parties. See *Lynch v. United States*, 292 U.S. 571 (1934)(invalidating congressional attempt to cancel government war risk life insurance). Tribe, *American Constitutional Law*, (2d ed. 1988), p. 613, n.1. But see *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984)(stating that the "standards imposed on economic legislation by the Due Process Clauses" are "less searching than those imposed on States by the contract clause"). Similarly, Congress may not unilaterally abrogate a treaty with an Indian tribe, or amend "or repeal a statute guaranteeing rights to a tribe or tribal members" unless it provides compensation under the Fifth Amendment takings clause. Tribe, *supra*, at 1474, n.42, citing *Hodel v. Irving*, 481 U.S. 704 (1987); *United States v. Sioux Nation of Indians*,

448 U.S. 371 (1980); See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 & n.9 (1955). Where a treaty between the United States and a tribe sets lands apart for the undisturbed use of a tribe,

> [federal] power does not extend so far as to enable the Government "to give the tribal lands to others or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . .; for that 'would not be an exercise of guardianship, but an act of confiscation'" [citations omitted].

Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937).

Ordinarily, "the same principles of just compensation presumptively apply to both private and public condemnees." *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). See *United States v. Carmack*, 329 U.S. 230, 242 (1946). Whether the rules governing compensation under the Fifth Amendment, or different rules grounded in the Tenth Amendment and the Constitutional scheme, apply to a Congressionally approved compact between sovereign States and tribes appears to be unsettled. At any rate, it is highly unlikely that the Fifth Amendment tolerates unilateral federal abrogation of contracts between sovereign States and sovereign tribes. See *Block v. North Dakota*, 461 U.S. 273, 291 (1983)("The State probably is correct in stating that Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution."). The Court of Appeals' ruling thus raises a serious constitutional issue whether, without providing compensation, Congress may approve implementation of a

settlement agreement between two sovereigns, only to change the terms materially by depriving the states of their bargained-for authority as few as 14 months after approval. Such a ruling should not stand unreviewed by this Court where, as here, there is an alternative statutory construction available. The Court of Appeals' ruling to the contrary calls for review by this Court in order to preserve the statutory and constitutional balance between the States, Indian tribes and Congress.

The Court of Appeals' decision raises a potentially more insuperable problem, as well. Even if IGRA provided compensation to the States, the construction given to IGRA by the Court of Appeals raises serious Tenth Amendment questions regarding Congress' alleged power to abrogate a sovereign-to-sovereign agreement unilaterally. Congress' power to curtail state authority has constitutional limits, rooted in the constitutionally recognized sovereignty of the States.[11] Under IGRA, as construed by the Court of Appeals, Congress

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[11] See *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1869)(state taxing power); *Coyle v. Smith*, 221 U.S. 559, 565 (1911)(Congress may not prescribe location of a state's capital); *Hopkins Federal Savings & Loan Association v. Cleary*, 296 U.S. 315 (1935)(conversion of quasi-public state savings and loan associations into federal associations contravenes the reserved powers of the states). See also *Fry v. United States*, 421 U.S. 542, 547, n.7 (1975)(the various provisions of the Constitution are to be construed harmoniously with the States' reserved powers); *Carmack*, 329 U.S. at 241, n.10 ("If the Federal Government desires exclusive legislative jurisdiction over land acquired by it, the Constitution indicates that the consent of the state in which the land is located is necessary," citing U.S. Const. Art. I, § 8, Cl.17).

has not simply enacted federal law, but has apparently required the States to negotiate away the very sovereignty for which they gave consideration to the tribes.

The leading, recent Tenth Amendment case is *New York v. United States*, 112 S.Ct 2408 (1992). There, the Supreme Court struck down the so-called "take title" provision of the Low Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021e(d)(2)(C). The take-title provision required that, if a State failed to have a disposal site constructed by the statutory deadline, then the State would take title to all low level radioactive waste generated within its boundaries. The Court held that the Constitution protects the States against "federal action [that] would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *Id.*, 112 S.Ct at 2428.

The defect in the Radioactive Waste statute was in the means chosen—commandeering of the state governmental process—rather than in the goal of the legislation; the Court readily acknowledged that Congress has authority to regulate disposal of hazardous waste:

> [W]hether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation. No matter how powerful the federal interest involved, the Constitution simply does not give

> Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

Id., 112 S.Ct. at 2429.

IGRA's compulsory negotiation provisions violate these principles. The fact that Rhode Island and other States had undisputable—and Congressionally ratified—regulatory authority over the lands in question prior to IGRA compounds the Tenth Amendment violation in this case. IGRA coerces the States to become involved involuntarily in administering a federal program either through compliance with the mandate of "good faith negotiations" or through Court orders, mandated negotiation and mediation. See 25 U.S.C. § 2710(d). The federal court in an IGRA case examines the good faith of high state officials performing discretionary functions relating to permitting gambling activities within the state's borders. 25 U.S.C. § 2710(d)(7). If the Court finds bad faith, it is to issue orders requiring the States to make good faith offers—which may be accepted and create binding obligations—even if the responsible State officials believe that no offer to approve class III gaming should be made, pursuant to general state policy against particular types of gambling. See 25 U.S.C. § 2510(d)(7)(B). This scheme commandeers the machinery of state government for federal purposes. In the case of settlement act States, the scheme compels the States to negotiate away their bargained-for rights under the federal

legislation approving their settlements.

It has been argued that IGRA presents no Tenth Amendment problem because a State may simply decline to negotiate and allow the matter to be decided by a mediator or the Secretary of Interior. *Cheyenne River Sioux v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993).[12] If compliance with IGRA's good faith negotiation provisions is truly voluntary, then there is no Article III "case or controversy" in IGRA cases. Article III does not place the courts in the position of mediating voluntary decisions of state governments. Cf. *Gilligan v. Morgan*, 413 U.S. 1 (1973)(complaint by students against Governor regarding deployment of the National Guard was not justiciable). The decision of the States and their Governors not to negotiate, if truly voluntary, would be the end of the matter. There would be no controversy for the court to adjudicate, no need for orders to negotiate and to mediate, and no reason for Article III courts to declare the rights of the Tribe to negotiate with an unwilling partner. The entire basis of the court's jurisdiction in the first place is the existence of a case or controversy over a legal *duty* purportedly established by IGRA: whether, in Senior District Judge

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[12] This argument was rejected by one court on the ground that IGRA is obviously not voluntary. See *Confederated Tribes of the Colville Reservation v. State of Washington*, No. CS-92-0426-WFN (E.D. Wash. June 4, 1993), slip op. at 3-4 (the Court "cannot simply choose to ignore the mandatory language which forces the State to take part in this regulatory scheme"), citing *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993) (Tenth Amendment invalidates provisions of the Forest Resources Conservation and Shortage Relief Act that mandate action by the States and are not mere "precatory admonitions").

Pettine's words, "the State is obligated to enter into good faith negotiations with the Tribe after receiving [the Tribe's] request." 816 F. Supp. at 800. If a legal obligation to negotiate in good faith exists, then the Tribe can hardly make the contradictory claim that negotiations are voluntary. Such a claim would render federal judicial judgments ordering negotiations advisory and therefore cannot be correct.

In short, the Court of Appeals' opinion raises serious Fifth and Tenth Amendment questions. All aspects of the Fifth and Tenth Amendment issues weigh in favor of Rhode Island's construction of the applicable statutes—a construction that avoids constitutional problems. The state interests protected by the Fifth and Tenth Amendments weigh heavily in favor of review by this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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In The

Supreme Court of the United States

October Term, 1994

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; JEFFREY B. PINE, in his capacity as Attorney General of the State of Rhode Island; TOWN OF CHARLESTOWN; ROBERT J. SCHEIDLER, CHARLES W. BECK, CHARLENE Q. DUNN, FORRESTER C. SAFFORD, and J. MICHAEL DOWNEY, in their capacity as Members of the Charlestown Town Council,

Petitioners,

vs.

NARRAGANSETT INDIAN TRIBE, GEORGE V. HOPKINS, in his capacity as Chief Sachem, and ANTHONY DEAN STANTON, in his capacity as First Councilman,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF SENATOR CLAIBORNE DeB. PELL AND SENATOR JOHN H. CHAFEE, AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Petitioners,

vs.

NARRAGANSETT INDIAN TRIBE, GEORGE V. HOPKINS, in his capacity as Chief Sachem, and ANTHONY DEAN STANTON, in his capacity as First Councilman,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Now come Claiborne DeB. Pell, Senior United States Senator from Rhode Island, and John H. Chafee, Junior United States Senator from Rhode Island, and move for leave, pursuant to Rule 37.2, to file a brief *amicus curiae* in

support of the petition for certiorari. Deputy Attorney General of Rhode Island Thomas M. Dickinson, counsel of record for the Petitioners, has consented to the filing of this brief, but the Respondents have declined to consent.

Interest of the Amici. The amici are the United States Senators from Rhode Island. The issue presented in this case is one of importance to the State of Rhode Island because it involves the interpretation of particular statutes and their effect upon Rhode Island. The amici were members of the United States Senate in 1978 when the Rhode Island Indian Land Claims Settlement Act (RICSA) 25 U.S.C. § 1701, *et seq.*, was enacted, and were also in the Senate when the Indian Gaming Regulatory Act (IGRA) 25 U.S.C. § 2701, *et seq.*, was enacted. With regard to IGRA, the amici actively participated in the floor debates and, in fact, engaged in a floor colloquy that elucidated the intended meaning of IGRA as it related to Rhode Island. The Court of Appeals below declined to make use of that floor colloquy in interpreting IGRA. As Senators from Rhode Island, the amici have an interest in the fair and accurate interpretation of both RICSA and IGRA. As members of the United States Senate, moreover, amici have an interest in the proper judicial use of legislative history as an interpretive aid.

The proposed *amicus curiae* brief has been printed herewith in accordance with Rule 37.2.

WHEREFORE, amici respectfully pray for leave to file the attached *amicus curiae* brief in support of the Petitioners.

RESPECTFULLY SUBMITTED
Amici curiae

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the First Circuit erred when it:

A. Held that the Indian Gaming Regulatory Act, which authorizes gambling on certain Indian lands, impliedly repealed portions of the pre-existing Rhode Island Indian Claims Settlement Act, which implemented a negotiated tribal-state compact between the State of Rhode Island and the Narragansett Indian Tribe; and

B. Refused to consider explicit statements in the Indian Gaming Regulatory Act's legislative history – to the effect that Congress did not intend the Act alter the Rhode Island Indian Claims Settlement Act.

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Now come Claiborne DeB. Pell, Senior United States Senator from Rhode Island, and John H. Chafee, Junior United States Senator from Rhode Island, amicus curiae, and pray that this court grant the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit, to review said court's erroneous judgment.

STATEMENT OF THE CASE

The amici adopt the Statement of the Case as set forth in the Petition.

INTEREST OF THE AMICI

The amici are the United States Senators from Rhode Island. Together, amici have nearly fifty years of service in the United States Senate. The amici were members of the United States Senate in 1978 when the Rhode Island Indian Land Claims Settlement Act (RICSA) 25 U.S.C. § 1701 *et seq.*[1], was enacted, and were also in the Senate when the Indian Gaming Regulatory Act (IGRA) 25 U.S.C. § 2701, *et seq.* (Pet. App. § E, at App. 85-93), was enacted. With regard to IGRA, the amici actively participated in the floor debates and, in fact, engaged in a floor colloquy that elucidated the intended meaning of IGRA as it related to Rhode Island. The Court of Appeals below declined to make use of that floor colloquy in interpreting

[1] Pertinent portions of this statute have been reproduced at Petitioners' Appendix section J, page App. 117-18 of the Petition, hereinafter cited as "Pet. App. § ___, at App. ___."

IGRA. As Senators from Rhode Island, the amici have an interest in the fair and accurate interpretation of both RICSA and IGRA. As members of the Senate, moreover, amici have an interest in the proper judicial use of legislative history as an interpretive aid.

SUMMARY OF ARGUMENT

Legislative history is an important side in understanding the meaning of statutory language. Historically, courts have relied upon legislative history as a basis for divining legislative intent. In this case, the Court of Appeals failed to credit pertinent portions of legislative history, particularly Senate floor debates in which amici actively participated. The petition for certiorari ought, therefore, to be granted to review the Court of Appeals' decision.

ARGUMENT

The Use of Legislative History Generally. Legislative history is variously regarded as including reports of committees, successive drafts of bills, and floor debates. *See generally* 2A *Sutherland on Statutory Construction*, §§ 48.01 *et seq.* (Singer 5th ed. 1992). Of these, floor debates generally immediately precede passage and therefore represent the final stage of the process that transforms a bill into a law. In a deliberative legislative body, floor debates serve several salutary functions. First, sponsors of a bill are given an opportunity, before the assembled legislative body, to explain the purpose and meaning of the bill's

provisions. Individual legislators who oppose or support the bill have a forum for expressing their views and explaining them to colleagues and constituents. Senators and Representatives who are undecided may listen to such discussions and, based upon the arguments that they hear, come to a decision on how they will vote. Finally, the give-and-take of floor colloquy affords an opportunity for legislators to inquire of the sponsor as to the effect of particular aspects of the proposed legislation.

Of course, floor debates and discussions are not part of the statute as written in its final form. Legislators, however, regard such debates as a meaningful and integral part of the legislative process. In performing their legislative duties, legislators undoubtedly place heavy reliance upon a sponsor's representation regarding the meaning of a particular provision. These representations and exchanges are memorialized in floor debate and colloquy. Because of the critical importance of these exchanges to legislators, courts must not minimize or ignore such exchanges in interpreting legislative enactments.

Justice Stephen Breyer's recent article on statutory construction identifies five possible reasons for judicial resort to legislative history as an aid to legislative interpretation:

(1) avoiding an absurd result;

(2) preventing the law from turning on a drafting error;

(3) understanding the meaning of specialized terms;

(4) understanding the "reasonable purpose" a provision might serve; and

(5) choosing among several possible "reasonable purposes" for language in a politically controversial law.

Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 860-61 (1992). If the judiciary discounts the use of committee reports and floor debates as aids to interpretation, Justice Breyer points out, "the technical quality of statutory law is likely to deteriorate significantly." *Id.* at 873. This is so, at least in part, because discounting legislative history would necessarily reduce the relevance of public hearings and floor debates, leading inevitably to change in legislative process. *Id.* at 873. Abandoning the use of legislative history, Justice Breyer cautions, is contrary to "the judiciary's important objective of helping to maintain coherent, workable statutory law . . . " *Id.* at 874.

The use of legislative history is not of recent origin. *The Federalist Papers* – attributed to James Madison, John Jay, and Alexander Hamilton and revered as a signal guide to the meaning of the Constitution – are actually part of the legislative history of the Constitution. Indeed, the Constitution itself specifically imposes upon each House the duty to "keep a journal of its proceedings, and from time to time publish the same . . . " U.S. Const. Art. I, § 5, cl. 3. The presence of this mandate in the text of the Constitution itself strongly suggests that the drafters recognized the importance of recording Congressional proceedings for later use in giving proper contextual meaning to Congressional enactments.

Of course, a jurisprudence based upon the doctrine of *stare decisis* is well acquainted with the notion that words must be placed in their proper context. The "holding" in any case decided by this Court, strictly speaking, is limited to the Court's judgment. The Court's opinion, of course, supplies the factual, historical, and logical context for the judgment; these elements are, accordingly, essential to a later court's application of the holding. Indeed, a court attempting to apply the holding to later facts may well rely upon concurring and dissenting opinions as tools that elucidate the meaning of the holding itself. On occasion, majority and dissenting opinions supply the reader with what is, in essence, vigorous "debate" that significantly illuminates the reasoning underlying the Court's holding. *Compare, e.g., Dolan v. City of Tigard*, 114 S. Ct. 2309, 2322 (1994) (Stevens, J., dissenting) *with id.* at 2316 n.15 (Chief Justice Rehnquist's majority opinion response to points raised in Justice Stevens' dissent). Although only the holding has binding *stare decisis* effect upon later courts, the remaining elements of the Court's opinions are frequently utilized to place the holding in its proper context and thereby to achieve complete understanding of it.

Thus, whether interpreting legislative enactments or applying the doctrine of *stare decisis*, an appellate court must frequently rely upon a variety of sources to elucidate the meaning of the text before it. In interpreting IGRA, however, the Court of Appeals in this case specifically refused to give appropriate weight to the statute's legislative history. Amici, as integral participants in the IGRA floor debate, agree with Petitioners that the Court of Appeals erred.

Floor Debates Regarding IGRA. As set forth in the Petition, the amici actively participated in the United States Senate's floor debates leading up to the passage of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, et seq. (Pet. App. § E, at App. 85-93). In particular, when the Senate first took up this bill on September 15, 1988, the amici engaged in a floor colloquy with the principal sponsor of the bill, Senator Daniel Inouye. The purpose of that colloquy was, obviously, to explore the potential impact of IGRA upon the pre-existing Rhode Island Indian Land Claims Settlement Act (RICSA), 25 U.S.C. § 1701, *et seq.* (Pet. App. § J, at App. 117-18). As can readily be seen from the text of the debate, Senator Pell requested that specific language in an early draft of IGRA be removed, with the explicit understanding that the language was unnecessary because IGRA did not apply to Rhode Island:

> Mr. PELL. Mr. President, I would like to thank the managers of S.555, the Indian Gaming Regulatory Act, and particularly the chairman of the Select Committee on Indian Affairs [Mr. Inouye], for their hard work and patience in achieving a consensus on this important measure.
>
> In the interests of clarity, I have asked that language specifically citing the protections of the Rhode Island Claims Settlement Act (Public Law 95-395) be stricken from S.555. I understand that these protections clearly will remain in effect.

> Mr. INOUYE. I thank my colleague, the senior Senator from Rhode Island [Mr. Pell], and assure him that the protections of the Rhode Island Claims Settlement Act (P.L. 95-395), will remain in effect and that the Narragansett Indian Tribe clearly will remain subject to the civil, criminal, and regulatory laws of the State of Rhode Island.
>
> Mr. CHAFEE. Mr. President, I too would like to thank the chairman [Mr. Inouye] and members of the Select Committee on Indian Affairs for their cooperation and assistance. The chairman's statement makes it clear that *any high stakes gaming, including bingo, in Rhode Island will remain subject to the civil, criminal and regulatory laws of our State.*

Pet. App. § G., at App. 102-03, 134 Cong. Rec. S12650 (daily ed. Sept. 15, 1988) (emphasis added).

Notwithstanding the clarity of legislative purpose evinced in this colloquy, the Court of Appeals concluded that IGRA constituted an implied repeal of RICSA as it relates to gambling on lands of the Narragansett Indians in Rhode Island. The Court of Appeals found that it was "unable to accept the colloquy at face value. In the game of statutory interpretation, statutory language is the ultimate trump card." Pet. App. at 28. The Court of Appeals correctly recognized that plain language of any statute

will govern over inconclusive or contrary legislative history. In this case, however, the Court of Appeals regarded IGRA as an "implied repeal" of RICSA; the very use of the term "implied" denotes that the language of IGRA on this point was not at all plain and therefore needed some interpretation. On such a state of affairs, amici submit, statements made during floor debate are an essential tool in determining legislative intent. Indeed, the importance of floor debate as an organic part of a statute's legislative development is confirmed by this Court's frequent citation to such debates as an aid to interpretation. *See, e.g., Wilder v. Virginia Hospital Association,* 496 U.S. 498 n.13 (1990) (relying in part on Sen. Boren's statements during floor debate as interpretive aids to "Boren Amendments" regarding medicaid reimbursement formulas); *Brock v. Pierce County,* 476 U.S. 253 (1986) (statement of principal sponsor during floor colloquy, when consistent with other legislative history, provides "evidence of Congress' intent"); *Regan v. Wald,* 468 U.S. 222 (1984) (relying on floor statement by relevant Subcommittee Chairman as interpretive aid in construction of amendments to Trading With Enemy Act). Some examples of this Court's use of legislative history this past Term include *Hagen v. Utah,* 114 S. Ct. 958 (1994), where the Court interpreted statutes involving Indian reservations, and *Landgraf v. U.S.I. Film Products,* 114 S. Ct. 1483 (1994), interpreting the 1991 amendments to Title VII.

As the Petitioners have pointed out, and as Senior Judge Coffin reasoned in dissent, the Court of Appeals' interpretation is demonstrably contrary to the intended purpose of IGRA, Pet. App. 47-52 (Coffin, J., dissenting).

After analyzing the floor debates and pertinent committee reports, Senior Judge Coffin concluded that if the court "assign[ed] the proper weight to the legislative history, I think it unavoidable that we would have concluded that the Gaming Act had effected no implied repeal of the Settlement Act." Pet. App. 52 (Coffin, J, dissenting).

CONCLUSION

Having actively participated in the IGRA debates, *amici* submit that Senior Judge Coffin's dissent more accurately interprets the meaning and import of IGRA relative to Rhode Island. The Court of Appeals erred in failing to credit the pertinent legislative history. The writ of certiorari ought, therefore, to be granted to review the Court of Appeals' decision.

Respectfully submitted

Amici curiae,

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(5)

Supreme Court, U.S.
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No. 94-68

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; JEFFREY B. PINE, in his capacity as Attorney General of the State of Rhode Island; TOWN OF CHARLESTOWN; ROBERT J. SCHIEDLER, CHARLES W. BECK, CHARLENE Q. DUNN, FORRESTER C. SAFFORD, and J. MICHAEL DOWNEY, in their capacity as Members of the Charlestown Town Council,

Petitioners

v.

NARRAGANSETT INDIAN TRIBE, GEORGE H. HOPKINS, in his capacity as Chief Sachem, and ANTHONY DEAN STANTON, in his capacity as First Councilman,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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SUPPLEMENTAL BRIEF

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September 14, 1994

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On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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SUPPLEMENTAL BRIEF

Respondent Narragansett Indian Tribe respectfully informs the Court that on August 29, 1994, Rhode Island Governor Bruce Sundlun, on behalf of the State of Rhode Island, and Chief Sachem George H. Hopkins, First Councilman Matthew Thomas and Second Councilman Michael Fayerweather, on behalf of the Narragansett Tribe, executed a Tribal-State compact to govern a tribal gaming operation pursuant to the Indian Gaming Regulatory Act,

25 U.S.C. §§ 2710(d)(1)(C) and (d)(3)(A).[1] The gaming operation will be in the Town of West Greenwich, Rhode Island. We believe this development moots the State's Petition for Certiorari.

Respectfully submitted,

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September 14, 1994

[1] The Narragansett Tribe herewith lodges with this Supplemental Brief 10 copies of the said Tribal-State Compact together with an accompanying News Release from Governor Bruce Sundlun and an August 30, 1994, article on the event by the Boston Globe.

No. 94-68

Supreme Court, U.S.
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In The

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY BRIEF AND RESPONSE TO SUPPLEMENTAL MEMORANDUM

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Now come the Petitioners, by their attorneys, and submit the within Reply Brief in response to the Respondents' Brief in Opposition and Supplemental Brief. The within Reply Brief addresses the legal issues that the Petitioners believe require response. As to all remaining issues, the Petitioners rest upon the submissions contained within the Petition for Certiorari.

I. THE WITHIN PETITION HAS NOT BEEN RENDERED MOOT AS A RESULT OF THE NEGOTIATIONS BETWEEN THE TRIBE AND THE GOVERNOR OF RHODE ISLAND.

The Respondent Narragansett Indian Tribe [hereinafter Respondent] suggests to this Court that the within Petition has been rendered moot. In support of this contention, the Tribe points out that on August 29, 1994, they executed an agreement [hereinafter referred to as "August 29 Agreement"] with Rhode Island Governor Bruce Sundlun, which agreement purports to be a "compact" pursuant to the Indian Gaming Regulatory Act. 25 U.S.C. § 2710. Petitioners vehemently dispute the Respondent's suggestion that this development renders this case moot. Petitioners suggest that there are serious and significant doubts about the consitutional authority of the Governor of Rhode Island – in the absence of specific authorization from the Rhode Island General Assembly – to bind the State to many of the terms of the August 29 Agreement. If anything, the August 29 Agreement demonstrates more eloquently than anything that has come before the inequitable and absurd consequences that have flowed from the Court of Appeals' erroneous decision below. Thus, the case for this Court's grant of certiorari is

made more compelling as a result of the August 29 Agreement.

Petitioners recognize that the legal issues raised by the August 29 Agreement *per se* are not before this Court at this time. Nevertheless, in order to refute the suggestion of mootness, Petitioners feel compelled to alert this Court that the August 29 Agreement in no way represents a resolution of the important issues that are presented by this Petition. Among the issues that will require further determination should this Court deny certiorari:

1. Whether the Governor of Rhode Island, without specific legislative authorization, may enter into an agreement that delineates specific types of gaming that will be permitted within the State of Rhode Island. *See R.I. Const.* Art. 6, § 15 (conferring upon legislature exclusive authority to authorize and regulate gambling within Rhode Island); *see generally State ex rel. Stephen v. Finney*, 836 P.2d 1169 (Ks. 1992) (governor of Kansas had no authority to bind state to terms of tribal-state compact absent appropriate delegation of power by state legislature or legislative approval of compact).

2. Whether the Governor of Rhode Island, without specific legislative authorization, has the authority to suspend the operation of a particular Rhode Island statute that affords residents of a community the right to vote by referendum on the presence of casino gambling within their community. *See* R.I. Gen. L. § 41-9-1 *et seq.* (requiring referendum in host community and state wide prior to construction of casino in any Rhode Island community). The August 29 Agreement provides for a referendum prior to construction of any casino in the Town of West

Greenwich, Rhode Island, but would permit the Respondents to construct a casino in Charlestown, Rhode Island, without any referendum in that community.

3. Whether the Governor of Rhode Island may limit the subpoena power of the Rhode Island Judiciary and Rhode Island's Grand Jury. *See State v. Almonte*, No. 93-374-C.A., slip op. (R.I. July 12, 1994) (limitation on subpoena power constitutes violation of doctrine of separation of powers). *See generally R.I. Const.* Art. I, § 7 (preserving common law powers of grand jury).

4. In the event that IGRA somehow confers the aforementioned powers upon the governor of a state, whether Congress has the authority to re-order the branches of government of a state in such a manner. *See generally* U.S. Const. Amend. X (reserving certain powers to the states); U.S. Const. Art. VI, § 4 (guarantee of republican form of government to every state).

As the Petitioners have pointed out in the Petition for Certiorari, jurisdiction and sovereignty were finally and completely resolved among these parties in 1978. The resolution of these issues was embodied in Rhode Island Indian Claims Settlement Act ("RICSA"), 25 U.S.C. § 1701, *et seq.*, which involved the concurrence of all three branches of the federal government, as well as the executive and legislative branches of the State of Rhode Island. The Court of Appeals' decision in this case has upset the arrangements that were finally resolved in RICSA, and the potential results of that decision are highly disruptive of Rhode Island's state government. Far from rendering the controversy moot, the August 29 Agreement sharply illustrates the legal and political disruption that follows from the Court of Appeals' erroneous interpretation of IGRA's effect upon RICSA. This Court can restore the

balance by granting certiorari in this case and reversing the errors of the Court of Appeals.

II. OTHER PETITIONS PRESENTLY PENDING BEFORE THE COURT INVOLVE ISSUES SIMILAR TO THE ONES PRESENTED IN THIS PETITION.

This Court currently has before it other petitions that involve IGRA and its effect in various states. In particular, the following cases present issues that are related to the issues presented in this case:

> *State of Washington v. Spokane Tribe*, No. 94-357 (U.S. petition for certiorari filed August 26, 1994) (cert. pending) (whether IGRA violates Eleventh Amendment);
>
> *Poarch Band of Creek Indians v. Alabama*, No. 94-35 (U.S., petition for certiorari filed July 1, 1994) (cert. pending) (whether IGRA violates Eleventh Amendment);
>
> *Florida v. Seminole Tribe of Florida*, No. 94-12 (U.S., petition for certiorari filed July 1, 1994) (cert. pending) (whether IGRA violates the Eleventh Amendment);
>
> *Mosay v. Buffalo Brothers Management*, No. 94-14 (U.S., petition for certiorari filed June 29, 1994) (cert. pending) (IGRA regulatory issues);

As can be seen from these pending certiorari petitions dealing with IGRA and its impact upon the states, this statute has generated a significant amount of litigation. These issues are, obviously, of great significance to the States in which they have arisen. Indeed, the multi-State amicus brief filed in support of the within petition demonstrates the national breadth and significance of the issues that the Petitioners have presented. In addition, Rhode Island's two United States Senators, representing a total of 50 years of service in the Senate, have written as

amicus to urge this Court to address the important statutory construction issue involved in this case.

Given the significant issues of state sovereignty presented by IGRA generally and by this case in particular, the Petitioners respectfully submit that this case – together with the other IGRA petitions pending – affords this Court with an important opportunity to resolve the substantial issues of federalism and statutory construction that IGRA presents. Petitioners, accordingly, pray that this Court grant certiorari to decide these significant issues.

III. RESPONDENTS ARE FORECLOSED FROM CHALLENGING THE COURT OF APPEALS HOLDING REGARDING THE VALIDITY OF THE SETTLEMENT ACT

In Respondents' "Counter Statement of Facts", they once again take issue with Petitioners' assertion that the Tribe agreed to the State's jurisdiction over tribal lands in the settlement of the land claims litigation in 1978. Respondents' Brief in Opposition ("*Res*".) at 3. They assert that "[t]he Tribe agreed to no such thing." *Id.* Further, Respondents argue that RICSA does not apply to the Tribe's "post-sovereign" status. *Id.* at 3, 4. Both of these arguments were raised below, and both of the arguments were resoundingly rejected by the unanimous panel of the First Circuit Court of Appeals. *Pet. App.* at 16-19, 22 n. 10.

Further, Respondents have deliberately chosen *not* to file with this Court a cross-petition for writ of certiorari to challenge the Court of Appeals' concise holding in this regard within the time allowed under the Supreme Court's Rules. *See* S.Ct. Rule 15. Their efforts to dredge

up these arguments, in the context of their brief in opposition, should therefore be rejected by this Court.

IV. THERE IS EVIDENT TEXTUAL SUPPORT TO THE PETITIONERS' ARGUMENTS THAT THE NARRAGANSETT TRIBE CANNOT MEET THE JURISDICTIONAL PREDICATE REQUIRED UNDER IGRA

Respondents repeatedly argue that the Petitioners cannot, and do not, support their petition with reference to textual support in IGRA for the proposition that the Narragansett Tribe's lands are not subject to the IGRA's Class III provisions. *Res.* at 6. They further assert that the Petitioners seek to substitute the language of legislative history for the language of the statutory text. *Res.* at 7-10. They are mistaken on both points.

First, as the Petition for Writ of Certiorari takes great pains to point out, there is clear textual support for the position that *this* Tribe cannot avail itself of the Class III provisions of IGRA relating to Class III gaming. Simply stated, IGRA mandates that certain preconditions must be established by a tribe in order to institute the "Tribal-State Compact" process towards a Class III gaming facility under IGRA. 25 U.S.C. § 2710(d)(1)(A), § 2710(d)(3)(A). Stated another way, IGRA's plain textual language establishes that *not all tribes* in the country may request such a "compact" process under IGRA for the purpose of engaging in Class III type gaming. Only those tribes "having jurisdiction" over lands are granted congressional authority to institute such a process. *Id.*; *See also Pet.* at 8, 9; *Pet. App.* at 85, 87.

As this Court has highlighted repeatedly, when Congress chooses to use language requiring certain conditions to be met in a statute, it must be presumed that these preconditions and prerequisites must be followed in accordance with the clear terms of the statute. *Connecticut Nat. Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992) ("we have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). When Congress provided in IGRA that only those tribes "having jurisdiction" over lands can institute IGRA's Class III provisions, it must be presumed that the predicate inquiry concerning a tribe's jurisdiction over its lands *must be undertaken in the first instance*. Thus, the initial inquiry in this case must focus on whether the Narragansett Indian Tribe "has jurisdiction" over its tribal lands in Rhode Island. The dictates for this inquiry flow directly from § 2710(d)(1)(A) and § 2710(d)(3)(A) of IGRA, and form the foundation for the Petitioners' argument. To suggest that Petitioners "do not start with the textual language", *Res.* at 6, is at best a complete distortion of the Petitioners' case.

Starting from this statutory predicate in IGRA, petitioners next argue that this Tribe does not "have jurisdiction" sufficient to meet this predicate because of their relinquishment of such "jurisdiction" to the State of Rhode Island in the 1978 Settlement Agreement, the RICSA, and the deeds of trust executed in 1988. Petitioners argue that there are no doubts about this. If doubts exist whether this tribe's transfer of jurisdiction at each stage leading up to IGRA rendered the tribe incapable of meeting the "having jurisdiction" requirement in IGRA, the "textual" language of IGRA certainly does little to resolve these doubts.

The legislative history to IGRA, however, answers any such doubts squarely: Believing that the RICSA divested this Tribe of the requisite "jurisdiction" needed in IGRA, the Rhode Island Senators and the sponsoring Senator expressed their belief that any *specific* language excluding the Narragansett Indian Tribe from IGRA would be completely redundant and unnnecessary. *See Pet.* at 11-13, *Pet. App.* at 102, 103. The answer was self-evident to the Senate; as a result of RICSA, the Narragansett Indian Tribe is one of the tribes of the country that simply does not "have jurisdiction" over its tribal lands sufficient to meet the prerequisites of IGRA's provisions, found in § 2710(d)(1)(A) and § 2710(d)(3)(A).

Indeed, the cases and authorities cited by the Respondents, when placed in this proper perspective, completely support the Petitioners' arguments. Respondents correctly point out that when the remarks of legislators, particularly the sponsor of legislation, are "consistent" with statutory language, they are to be afforded "great weight". *Res.* at 8. (Citation omitted.) That *is* the case here. The legislative history, in both the colloquy and the committee reports as initially drafted, are entirely "consistent" with the necessary predicate analysis, required in the statutory language of IGRA, of whether *this* Tribe has sufficient "jurisdiction" over its lands. IGRA §§ 2710(d)(1)(A), 2710(d)(3)(A). Accordingly, the legislative history is strong evidence that supports the Petitioners' interpretation of legislative intent.

The Petitioners seek not to elevate the legislative history in place of the statutory text; rather, proper resort to the legislative history as evidence of congressional intent that is "consistent" with the jurisdictional inquiry required in the text of IGRA is completely proper under

standard principles of statutory interpretation. Indeed, when so viewed, the Respondents concede the Petitioners' case. "Petitioners' position might have merit *if it was supported by statutory text . . .* " *Res.* at 6 (emphasis added). Petitioners assert that the text of IGRA does support their argument. The Narragansett Tribe does not "have jurisdiction" sufficiently over its lands to come within the terms of IGRA.

V. THE SENATE DID NOT "VOTE" TO INCLUDE THE NARRAGANSETT TRIBE IN THE CLASS III PROVISIONS OF IGRA

Respondents also seek to support their interpretation of statutory intent by arguing that "by vote of the Senate", a specific exclusion of the Narragansett Tribe was deleted. *Res.* at 7. Respondents argue that such a deletion, under rules of construction, establish congressional intent to authorize the Narragansett Tribe's efforts to institute IGRA's Class III provisions. *Id.* This two-tiered argument is flawed from the start.

As the Congressional Record makes clear, there was no "vote of the Senate" to delete former Section 23 (pertaining to the Narragansett Tribe) from the text of IGRA. On the contrary, Section 23 was removed at the request of Rhode Island Senator Claiborne Pell *prior* to any vote of the full Senate. This was based upon his belief, shared by Senators Chafee and IGRA's sponsor, Senator Inouye, that the specific limiting language relating to this tribe was merely redundant and unnecessary given the harmonious interplay of RICSA with IGRA. *See Pet.* at 11-13, *Pet. App.* at 102, 103.

Thus, the removal of the specific limiting language of the Narragansett Tribe, coupled with the retention of the

limiting language to tribes generally, found in IGRA's § 2710(a)(1)(A) and § 2710(d)(3)(A), proves that it was unnecessary for the Senate to provide a separate, special limitation for *this* tribe in IGRA.

VI. CONCLUSION

For the foregoing reasons, and for such reasons as appear in the original Petition for Certiorari, Petitioners respectfully pray that this Court grant its writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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